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No. 78-1281

In the Supreme Court of the United States

OCTOBER TERM, 1978

IOWA BEEF PROCESSORS, INC., PETITIONER

v.

NEAL SMITH, Chairman of the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the Committee on Small Business, United States House of Representatives, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinions of the U.S. Court of Appeals for the Eighth Circuit (App. A-30) and the U.S. District Court for the Northern District of Iowa (App. A-21) are currently unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1979. The petitioner submits that this Court has certiorari jurisdiction under 28 U.S.C.

§ 1254(1). The respondent submits that this Court has no jurisdiction for the reasons cited below and therefore the appeal should be dismissed.

QUESTIONS PRESENTED

1. Whether this appeal should be dismissed because the respondent has been named here as a party for the first time.
2. Whether this Court has jurisdiction to grant the relief sought by IBP because the Speech or Debate Clause protects these investigative activities of a Congressman and a Congressional Committee.
3. Whether the opinion of the Eighth Circuit either sanctioned procedures which violated due process or created a conflict in rulings among the Circuits.
4. Whether the trial court committed a clear abuse of discretion in modifying the protective order.

STATEMENT

From 1971 to 1975, Hughes A. Bagley was employed by Iowa Beef Processor, Inc. (IBP) of Dakota City, Nebraska. Mr. Bagley was a Vice President of IBP when he was fired in July of 1975. On the day he was fired, Mr. Bagley cleaned out his office and took with him a number of items, including approximately seven file cabinet drawers of documents and materials which had crossed his desk while he was employed by IBP. These items are generally referred to as the "Bagley documents." The original Bagley documents have for some time been in the possession of Mr. Bagley's attorney, William Rawlings, in Sioux City, Iowa.

In approximately 1975, a number of private antitrust cases were filed throughout the United States by various cattlemen against many meat packing firms and retail food chains. These actions have been assigned under the multi-district litigation plan to Judge William M. Taylor of the Northern District of Texas in Dallas and are known as the *Beef Industry Antitrust Litigation.* IBP is a defendant in these actions. On October 23, 1976, Judge Taylor entered a protective order in the *Beef Industry Antitrust Litigation* which protected items produced during pre-trial discovery.

In January of 1977, Mr. Bagley apparently met on several occasions with two of the plaintiff's attorneys in the *Beef Industry Antitrust Litigation.* The subject of these meetings apparently involved, in part, the Bagley documents. IBP subsequently sued Mr. Bagley, the two attorneys (Lex Hawkins of Des Moines and John A. Cochrane of St. Paul) and others alleging that they had conspired to commit wrongful acts against IBP. This action was filed in the Northern District of Iowa and is captioned *Iowa Beef Processors, Inc.* v. *Gorman, et al.* On February 13, 1978, Chief Judge Edward J. McManus of the Northern District of Iowa entered a protective order which also protected items produced during pre-trial discovery.

On October 13, 1977, the Committee on Small Business of the U.S. House of Representatives, through the Subcommittee on SBA and SBIC Authority and General Small Business Problems (both of which

are chaired by Congressman Neal Smith of Iowa), began a series of hearings which have examined the topic of impediments to marketing in the meat industry in the United States and its effect on small businesses. This authorized investigation is continuing at the present time. To date, two bills have been introduced by Chairman Smith as a result of this investigation: "The Fair Meat Trading Act of 1979" (H.R. 91) and "The Loading-Unloading Act of 1979" (H.R. 753).

On November 3, 1977, the Committee on Interstate and Foreign Commerce, through the Subcommittee on Oversight and Investigations, issued two subpoenas in connection with an investigation being conducted by that Committee. One subpoena was issued to attorney Cochrane and the second subpoena was issued to one Glen Freie, a plaintiff in the *Beef Industry Antitrust Litigation.* The subpoenas directed Mr. Cochrane and Mr. Freie to produce, *inter alia,* all discovery obtained from a corporation known as The National Provisioner, Inc. The National Provisioner, Inc. is also a defendant in the *Beef Industry Antitrust Litigation.* The issues involved with these subpoenas are moot as the Committee on Interstate and Foreign Commerce, through the Subcommittee on Oversight and Investigations, has terminated the investigation which led to the issuance of these subpoenas.

In November, 1977, the Committee on Small Business of the U.S. House of Representatives, through the Subcommittee on SBA and SBIC Authority and General Small Business Problems, issued a subpoena

to Mr. Freie directing that he produce approximately 150 specified pages from the deposition of Lester Norton, taken in connection with the *Beef Industry Antitrust Litigation.* Mr. Norton is the President of The National Provisioner, Inc. Mr. Norton's deposition had previously been voluntarily furnished to the Committee by The National Provisioner, Inc., minus the approximately 150 pages which were designated confidential by The National Provisioner, Inc., pursuant to Judge Taylor's protective order.

On February 23, 1978, the Committee on Small Business of the U.S. House of Representatives, through the Subcommittee on SBA and SBIC Authority and General Small Business Problems, issued a subpoena to attorney Lex Hawkins of Des Moines. This subpoena directed that Mr. Hawkins produce all documents given to him by Mr. Bagley and also required that Mr. Hawkins produce, *inter alia,* all documents, exhibits and depositions in Mr. Hawkins' possession taken in the case of *Iowa Beef Processors, Inc.* v. *Gorman, et al.* On March 22, 1978, a hearing was held in Texas before Judge Taylor who ruled from the bench that he would not lift the protective order so Mr. Hawkins and Mr. Freie could comply with the Congressional subpoenas.

On July 27, 1978, a second hearing was held before Judge Taylor at which time attorneys for the U.S. House of Representatives entered appearances in the *Beef Industry Antitrust Litigation.* On August 17, 1978, Judge Taylor filed an order in which he again refused to lift the protective order in the *Beef Indus-*

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try Antitrust Litigation so that Mr. Hawkins and Mr. Freie could comply with the Congressional subpoenas. This decision was appealed to the United States Court of Appeals for the Fifth Circuit and on February 2, 1979, the Fifth Circuit dismissed the appeal.

The present action began on October 30, 1978, when the Committee on Small Business of the U.S. House of Representatives, through the Subcommittee on SBA and SBIC Authority and General Small Business Problems, issued a *subpoena duces tecum* directly to Mr. Bagley. Mr. Bagley was served in Iowa on October 31, 1978, by Deputy U.S. Marshall Jerry R. Parkinson. The *subpoena duces tecum* essentially called for Mr. Bagley to produce the originals or copies of all documents which he had in his possession relating to IBP.

On November 1, 1978, Mr. Bagley filed a pleading in the Northern District of Iowa entitled "Motion to Lift Protective Order or In The Alternative for Guidelines" indicating that he had no objection whatsoever to complying with the *subpoena duces tecum*" and that he "does not object to cooperating with the House of Representatives of the United States."

On November 3, 1978, U.S. Magistrate James Hodges of the Northern District of Iowa telephoned John M. Fitzgibbons, Special Counsel to the Committee on Small Business, and advised him that Mr. Bagley had filed the motion asking for the Court's guid-

ance. Magistrate Hodges indicated to Mr. Fitzgibbons that Chief Judge McManus was engaged in a difficult patent trial and asked if the Committee would delay enforcement of the *subpoena duces tecum* until Chief Judge McManus had the opportunity to study the matter and issue a ruling. As a courtesy to the Court, Mr. Fitzgibbons agreed and on this date wrote a letter to Mr. Bagley's attorney advising him that compliance with the *subpoena duces tecum* would not be required until Chief Judge McManus had ruled. A copy of this letter was also sent to IBP's attorney.

On Wednesday, November 22, 1978, Chief Judge McManus signed an order modifying the protective order so that Mr. Bagley could comply with the Congressional *subpoena duces tecum*. The order was filed on Friday, November 24, 1978 (the day after Thanksgiving), at approximately 10:00 a.m. (CST). Mr. Fitzgibbons had been calling the office of the Clerk for the U.S. District Court for the Northern District of Iowa virtually daily and on November 24, 1978, at approximately 12:00 noon (EST), Mr. Fitzgibbons was advised that the order had been filed. The order was read by the Clerk's office over the telephone to Mr. Fitzgibbons.

On Monday, November 27, 1978, Investigator Nick Wultich of the Committee on Small Business appeared at Mr. Bagley's attorney's office in Sioux City and took possession of the Bagley documents pursuant to Chief Judge McManus' order.

The Bagley documents obtained by Mr. Wultich were photostated by the Committee on Small Business and the original Bagley documents have been returned to Mr. Bagley's attorney, pursuant to Chief Judge McManus' order that the original Bagley documents be accessible to the litigants in *Iowa Beef Processors, Inc.* v. *Gorman, et al.* The Committee on Small Business presently has in Washington copies of approximately 3,000 pages of the Bagley documents.

On Tuesday, November 28, 1978, the Chicago attorney for IBP, Edward W. Rothe, received by mail a copy of Chief Judge McManus' order of November 24 1978. After learning that the Committee on Small Business had already obtained the Bagley documents, IBP filed a petition in the Eighth Circuit asking the Court to grant the following relief:

> (1) Enter an order staying Chief Judge McManus' order of November 24, 1978, until IBP had appealed.
>
> (2) Issue a Writ to Congressman Smith, Special Counsel Fitzgibbons, Investigator Wultich, Mr. Bagley and Mr. Bagley's attorney, William Rawlings, directing that they deposit all the original Bagley documents and all copies of the Bagley documents with the Clerk of the U.S. District Court until IBP had appealed, or to show cause why they should not be held in contempt of Court.
>
> (3) Enter an order to Congressman Smith, Special Counsel Fitzgibbons, Investigator Wultich, Mr. Bagley and Mr. Bagley's attorney, William Rawlings, directing that they not disclose the contents of the Bagley documents until IBP had appealed.

On December 4, 1978, a special hearing was held in Little Rock, Arkansas, before Judge J. Smith Henley of the Eighth Circuit in regard to IBP's petition. Judge Henley issued an order on this date staying Chief Judge McManus' order until December 16, 1978. The Committee on Small Business had agreed as a courtesy to the Eighth Circuit that it would not make the Bagley documents public until after that date.

On December 12, 1978, oral argument was held in St. Louis before a three-judge panel of the Eighth Circuit in regard to IBP's petition. On December 14, 1978, the Eighth Circuit issued an opinion denying IBP's petition and set January 9, 1979, as the date for oral argument on an expedited appeal on the merits of IBP's petition.

On January 9, 1979, the expedited appeal was heard in St. Louis before the same three-judge panel of the Eighth Circuit. On February 7, 1979, the Eighth Circuit issued its opinion denying IBP relief.

On February 23, 1979, IBP filed a Motion for Preliminary Injunction with the Supreme Court asking for an order directing Chairman Smith to turn over all the Bagley documents to the Court and, further, for this Court to order Chairman Smith and the Congress not to reveal publicly what had been learned from reviewing the documents. On February 26, 1979, this Court denied IBP's motion.

On March 6, 1979, Chief Judge McManus of the Northern District of Iowa filed a Petition for Rehearing and Reconsideration in the Eighth Circuit.

Chairman Smith intends to resume shortly the public hearings dealing with impediments to marketing in the meat industry. He has repeatedly stressed that the Bagley documents will be utilized by the Committee only in furtherance of its legislative function. Chairman Smith has stated that the Bagley documents will be utilized to determine whether existing laws are sufficient to ensure competition in the meat industry or whether new legislation is needed. The Bagley documents might also be utilized for purposes of cross examination of certain witnesses or to corroborate the testimony of other witnesses.

ARGUMENT

I. THE GRANTING OF THE WRIT OF CERTIORARI WOULD BE IMPROVIDENT AND THIS APPEAL SHOULD BE DISMISSED AS RESPONDENT SMITH HAS BEEN NAMED A PARTY HERE FOR THE FIRST TIME

By naming Chairman Smith as a party here for the first time, the petitioner seeks to involve this Court in a dispute which should properly be presented to a United States District Court.[1]

The Eighth Circuit opinion which petitioner is asking the Supreme Court to review was rendered in

[1] It should be noted that petitioner does not seek to invoke any original jurisdiction of this Court but is applying solely for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit.

Iowa Beef Processors, Inc. v. *Bagley,* an action involving IBP and its former employee, Hughes A. Bagley. Chairman Smith's involvement in the Eighth Circuit proceeding was limited to a special appearance by the Committee's Special Counsel. At no time did IBP object to the special appearance and at no time did IBP seek to have Chairman Smith or the Committee on Small Business named as parties at any stage of the proceedings below. Furthermore, the Eighth Circuit stated in its opinion of February 12, 1978:

> At the outset, it should be noted that the Subcommittee is not a party to the underlying litigation nor a party to this appeal.[8]

[8] Special Counsel to the Subcommittee, John M. Fitzgibbons, appeared specially to brief and argue the case before this Court.

This attempt by petitioner to make Chairman Smith the respondent here for the first time is contrary to the long standing principle that only parties to lower court actions can maintain or be named as a respondent on appeal. Chief Justice Taney wrote in *Payne* v. *Niles,* 61 U.S. 219 (1857) that "It is well settled in all common law courts, that . . . no one can be named a defendant in (a) writ of error unless he was a party to the judgment in the court below . . ." This principle retains its vitality today. *See Commonwealth of Pennsylvania v. Rizzo,* 530 F. 2d 501 (3rd Cir. 1976). If the petitioner wishes to seek relief against Chairman Smith, the Committee on Small Business or the United States House of Representatives, then its

arguments should be directed to a U.S. District Court and not, at this time, to the Supreme Court.

II. THIS COURT DOES NOT HAVE JURISDICTION TO GRANT THE RELIEF SOUGHT BY IBP AS THE ACTIVITIES OF CHAIRMAN SMITH AND THE COMMITTEE ON SMALL BUSINESS ARE IMMUNE FROM JUDICIAL INTERFERENCE BECAUSE OF THE PROTECTION OF THE SPEECH OR DEBATE CLAUSE OF THE CONSTITUTION

The Speech or Debate Clause (Art. I, Section 6) of the Constitution provides that "for any Speech or Debate in either House, they (Senators and Representatives) shall not be questioned in any other Place."

On at least nine occasions, the Supreme Court has considered questions relating to the scope and application of the Speech or Debate Clause: *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975); *Doe* v. *McMillan,* 412 U.S. 306 (1973); *Gravel* v. *United States,* 408 U.S. 606 (1972); *United States* v. *Brewster,* 408 U.S. 501 (1972); *Powell* v. *McCormick,* 395 U.S. 486 (1969); *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967); *United States* v. *Johnson,* 389 U.S. 169 (1966); *Tenney* v. *Brandhove,* 341 U.S. 367 (1951); *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881). The principles established in these cases govern the decision here and lead to the conclusion that this Court may not grant the relief sought by IBP.

The Speech or Debate Clause was specifically designed to prevent "intimidation by the executive and

accountability before a possible hostile judiciary," reinforces the separation of powers and protects legislative independence and integrity. *Eastland* v. *United States Servicemen's Fund, supra; United States* v. *Johnson, supra; Gravel* v. *United States, supra.* As to the judicial branch, the protection afforded by the Clause is "not only from the consequences of litigation's results but also from the burden of defending suits." *Eastland* v. *United States Servicemen's Fund, supra; see Dombrowski* v. *Eastland, supra.*

The leading case in support of the argument advanced by Chairman Smith and the Congress is *Eastland* v. *United States Servicemen's Fund, supra.* The facts are similar to the case at bar and involved a *subpoena duces tecum* issued by the Senate Subcommittee on Internal Security to a third party (a bank), requiring that certain banking records of the United States Servicemen's Fund be produced. The United States Servicemen's Fund was an organization which opposed the Viet Nam War. In ruling that the activities of the Senate Subcommittee were immune from judicial interference, this Court stated:

> The applicability of the Clause to private civil actions is supported by the absoluteness of the terms "shall not be questioned," and the sweep of the terms "in any other Place." In reading the Clause broadly we have said that legislators acting within the sphere of legitimate legislative activity "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski* v. *Eastland, supra,*

> at 85. Just as a criminal prosecution infringes upon the independence which the Clause is designed to preserve, a private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. Private civil actions also may be used to delay and disrupt the legislative function. Moreover, whether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled. We reaffirm that once it is determined that Members are acting within the "legitimate legislative sphere" the Speech or Debate Clause is an absolute bar to interference. *Doe* v. *McMillan,* 412 U.S., at 314.

Furthermore, in *Doe* v. *McMillan,* Justice Rehnquist wrote:

> But the prospect of the District Court's enjoining a committee of Congress, which, in the legislative scheme of things, is for all practical purposes Congress itself, from undertaking to publicly distribute one of its reports in the manner that Congress has by statute prescribed that it be distributed, is one that I believe would have boggled the minds of the Framers of the Constitution. *Doe* v. *McMillan,* 412 U.S. 306, 344 (1972) (Rehnquist, J., concurring and dissenting).

This Court also reaffirmed in *Eastland* v. *United States Servicemen's Fund* that the investigative actions of a Congressional Committee fall within the sphere of legitimate legislative activity.

Therefore, the holding of *Eastland* v. *United States Servicemen's Fund* clearly protects Chairman Smith's investigative activities. The investigation at issue is related to and in furtherance of a legitimate task of Congress concerning an issue within the "legitimate legislative sphere." This Court does not have jurisdiction to grant the relief sought by IBP as the activities of Chairman Smith and the Committee on Small Business are immune from judicial interference because of the protection of the Speech or Debate Clause of the Constitution.

III. THE PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

A. THE NON-APPEALABILITY HOLDING OF THE EIGHTH CIRCUIT WAS CORRECT

The Eighth Circuit was correct in holding that the District Court order modifying the protective order was not appealable. Both the cases cited and the opinion of the Eighth Circuit clearly indicate that orders regarding the production of documents are *not* appealable as collateral orders under *Cohen* v. *Beneficial Industrial Loan Company,* 337 U.S. 541 (1949). *See Alexander* v. *United States,* 201 U.S. 117 (1906).

Even if this Court accepts IBP's argument that there is a conflict between the Circuits on the appealability of the issue, the Petition for Writ of Certiorari should be denied as this Court does not have jurisdiction to grant the relief sought by IBP. IBP apparently seeks to have the following scenario occur: This Court would hold that the order modifying

the protective order *was* appealable and therefore Rule 62(a) of the Federal Rules of Civil Procedure comes into play which provides for an automatic 10-day stay period for executions upon judgments. IBP would then argue that the obtaining of the Bagley documents within the 10-day period by the Committee was improper and the District Court would be requested to order Chairman Smith and the Committee to return the documents. If they refused, IBP would then request the District Court to hold Chairman Smith and the Committee in contempt. However, IBP's argument is flawed for several reasons. First, neither Chairman Smith nor the Committee on Small Business are parties to the action in the Northern District of Iowa and therefore cannot be subject to an order of the Court in that action. Second, under the principles enunciated in *Eastland* v. *United States Servicemen's Fund, supra,* and the other cases referred to above, the District Court does not have jurisdiction in this situation to enter an order to the Chairman of a Congressional Committee or to the Committee itself to return the documents in question.

B. THE EIGHTH CIRCUIT DID NOT SANCTION PROCEDURES WHICH VIOLATED DUE PROCESS

The facts of this case do not support IBP's claim that the Eighth Circuit sanctioned procedures which violated due process. At all stages of this litigation, both Chairman Smith and the Committee on Small Business have acted legally, ethically and properly.

First, IBP has greatly exaggerated the nature and content of the Bagley documents and also exaggerated its claims of privilege. A review of Chief Judge McManus' Petition for Rehearing and Reconsideration, reproduced in the Appendix, indicates that IBP's claims of lawyer-client privilege and some sort of trade secrets privilege apparently *have been lost* long before any civil litigation began involving the Bagley documents. Furthermore, at the time IBP obtained the protective order in the Northern District of Iowa, its attorneys failed to seek a preliminary injunction to protect the documents. It was only after Mr. Bagley was served with the Congressional subpoena that IBP sought to have the Bagley documents impounded.

Second, it is uncontrovered that Chairman Smith and the Committee on Small Business have never been and are not now parties to either *Iowa Beef Processors, Inc.* v. *Bagley* or *Iowa Beef Processors, Inc.* v. *Gorman, et al.* It is difficult to comprehend how any due process rights of IBP have been violated by an entity which is not even a party to the case below. A properly executed Congressional subpoena, issued in conformity with the Rules of the United States House of Representatives, was served upon Mr. Bagley for documents which had been in his possession for almost four years. As a courtesy to the U.S. District Court, Chairman Smith and the Committee agreed to stay the return date of the subpoena until the Federal judge had an opportunity to review the matter. IBP was given the opportunity to file a resistance with the

Court, after which time the District Court permitted Mr. Bagley to comply with the Congressional subpoena. It was only after the U.S. District Judge issued his modification order that the Committee obtained the Bagley documents. None of these procedures violated the due process rights of IBP which has had an opportunity to be heard at both the District Court and Circuit Court level.

C. THE CIRCUITS ARE NOT IN CONFLICT ON THE COMMITTEE'S NEED FOR CONGRESSIONAL AUTHORIZATION

IBP is not correct in stating that the Fifth and Eighth Circuits are at odds on the Committee's need for *full* House authorization before undertaking court proceedings to enforce its subpoena.

In the Fifth Circuit case, attorneys for the House formally filed appearances and were deemed to have intervened in the *Beef Industry Antitrust Litigation* in the Northern District of Texas. The Fifth Circuit dismissed the subsequent appeal of the House for the reason that the actions in Texas to enforce the Congressional subpoena had not been authorized by the *full* House of Representatives, as required by the Rules of the House.

In the Eighth Circuit case, no such formal appearance or "constructive" intervention was made by any attorney for the House of Representatives. An attorney for the Committee did present the Committee's case in the form of a special appearance, which was permitted by the Eighth Circuit and *which was not objected to at any stage by IBP*. The Eighth Circuit's opinion of February 7, 1979, clearly states that the

Committee appeared specially to brief and argue the appeal.

The facts of each of the cases are also different. In the Fifth Circuit case, subpoenas were served on attorneys and plaintiffs in the *Beef Industry Antitrust Litigation* seeking depositions and documents in their possession as a result of discovery conducted in the case. *But for* the *Beef Industry Antitrust Litigation,* these persons would not have possessed the documents described in the subpoenas. On the other hand, in the Eighth Circuit case a subpoena was served directly on Mr. Bagley, the person who actually possessed the documents and who had possessed the documents long before any actions were filed in either the Northern District of Texas or the Northern District of Iowa.

IV. EVEN IF THIS COURT CONCLUDES THAT IT HAS JURISDICTION TO REVIEW THIS MATTER, THE PETITION SHOULD NOT BE GRANTED AS THE TRIAL COURT ACTED PROPERLY IN MODIFYING THE PROTECTIVE ORDER

Protective orders are authorized and controlled by Rule 26(c) of the Federal Rules of Civil Procedure. It is well settled that the granting or denial of a protective order is well within the broad discretion of the trial court and only a clear abuse of that discretion would be cause for reversal. *Galella* v. *Onassis,* 487 F.2d 986 (2nd Cir. 1973); *General Dynamics Corp.* v. *Selb Manufacturing Co.,* 481 F.2d 1204 (8th Cir.), *cert. denied,* 414 U.S. 1162 (1973).

In this instance, a highly respected and experienced trial judge carefully considered his protective order

and concluded that it should be modified. The Petition for Rehearing and Reconsideration filed by Chief Judge McManus, which is reproduced in the Appendix, clearly shows that the trial court did not abuse its discretion in modifying the protective order.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, WESTERN DIVISION

IOWA BEEF PROCESSORS, INC., PLAINTIFF

v.

PATRICK E. GORMAN, HARRY R. POOLE, AND SAM TALARICO, AS REPRESENTATIVES OF THE MEMBERS OF AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO; IRVING STERN; ALBERT J. KRIEGER; LEX HAWKINS; JOHN A. COCHRANE; HUGHES A. BAGLEY, AND HANS AARSEN, DEFENDANTS

No. C 77–4040

ORDER

(Filed February 13, 1978)

The matter before the court is the latest imbroglio of the parties.[1] Pending motions are:

[1] The court has examined the transcript of the hearing before the Judicial Panel on Multidistrict Litigation (September 30, 1977) wherein Judge Weinfield described this litigation as "a donnybrook . . . [and] a case of crimination and recrimination, charges and counter-charges, and carrying with it the usual bitterness . . . [where] almost every question that is put to a witness would draw an objection". The record to date appears to support this assessment.

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(1) Defendant John A. Cochrane's resisted motions to dismiss and for a protective order, both filed July 22, 1977. Denied.

(2) Defendant Lex Hawkins' resisted motions to dismiss and for a protective order, both filed July 22, 1977. Denied.

(3) Defendant Albert J. Krieger's resisted motion to dismiss filed August 15, 1977. Denied.

(4) Plaintiff's resisted motion to enjoin a separate action filed in the United States Court for the Southern District of Iowa filed August 15, 1977. Denied.

(5) Defendants Hawkins and Cochrane's resisted motions to dismiss and for a protective order, both filed August 30, 1977. Denied.

(6) Defendants Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO (Union), Patrick E. Gorman, Harry R. Poole, and Sam Talarico's resisted motion to dismiss filed September 6, 1977. Denied.

(7) Plaintiff's resisted motion to compel production of documents filed September 8, 1977. Granted.

(8) Defendant Irving Stern's resisted motion to dismiss filed September 26, 1977. Denied.

(9) Plaintiff's resisted motions for summary judgment, for a protective order and to compel discovery, all filed October 28, 1977. Granted and denied in part.

(10) Defendants Hawkins and Cochrane's resisted motion to compel answers to deposition questions filed December 13, 1977. Granted and denied in part.

In this diversity action plaintiff seeks damages and injunctive relief against defendants for their role in the alleged malicious inducement to breach and breach of a settlement agreement between plaintiff and de-

fendant Hughes A. Bagley [Bagley], plaintiff's former Vice-President.[2] Plaintiff claims that Bagley met with the defendants several times and provided copies of plaintiff's documents, secured with the help of defendant Aarsen, to the defendant attorneys for the purpose of aiding antitrust litigation pending against plaintiff in Texas, (M.D.L. No. 248). Plaintiff alleges that the conduct by Bagley violates both the terms of his settlement agreement and his fiduciary duty to the company and that it was knowingly and maliciously induced by various defendants who conspired to use the inside information to cause damage to IBP's business.

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[2] The settlement agreement, summarized, compromised Bagley's compensation claims under his employment contract and released IBP from latent suits by Bagley in return for a release of Bagley from a covenant not to compete contained in his employment contract and a release of any cause of action IBP may have had to the time of the settlement agreement.

Paragraph 3.2 of the covenant bound Bagley to refrain from assisting third-party litigation against IBP, stating:

"3.2 BAGLEY, for himself and heirs, legal representatives and assigns, covenants with IBP to forever refrain from aiding, abetting or in any way assisting any third person not a party to this agreement in the bringing of any action or the prosecution of any claim or demand of whatever kind or nature against IBP for any matter, fact, circumstances, happening or thing whatsoever occurring or failing to occur from the beginning of the world to the day of the date of these presents. BAGLEY hereby agrees that any breach of this covenant by him would not be adequately compensable in damages and agrees that, in the event of any breach by him of said covenant, IBP shall, in addition to any claim for damages for breach of covenant to which it may be entitled, be authorized and entitled to seek and obtain equitable relief by way of injunction or otherwise in a court of competent jurisdiction."

MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Plaintiff originally brought this suit against *inter alia* the Union as an entity. Defendants Hawkins and Cochrane originally sought to dismiss for lack of diversity averring that the Union had many members of Nebraska citizenship, the citizenship of plaintiff. Plaintiff then amended its complaint to drop Amalgamated and add its three top officers as representatives of the union and its members. The purpose of the amendment as stated in plaintiff's brief was to "utilize . . . the procedure provided in Rule 23.2 of the Federal Rules of Civil Procedure added in 1966 to avoid the absurdities created by the ancient doctrine that a labor union takes the citizenship of its members. . . ."[3]

Defendants Hawkins, Cochrane, Stern, Gorman, Poole and Talarico moved to dismiss, again on the basis of lack of subject matter jurisdiction. Defendants contend that Rule 23.2 FRCP is not a class action rule and that the citizenship of all union members is still the relevant determinant of diversity.

The question here is whether Rule 23.2 establishes a class action with respect to unincorporated organizations thereby making the citizenship of the representatives of the class, together with the citizenship of plaintiff, solely determinant of diversity. If the rule is a class action rule, jurisdiction is established since plaintiff and the representative parties are of diverse citizenship. If the rule is not a class action rule the court lacks jurisdiction since it is undisputed that some members of the Union are of the same citizenship as plaintiff.

[3] IBP's Opposition to the Hawkins and Cochrane Motion to Dismiss, filed August 1, 1977, at 5.

The rule states:

> An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

Wright & Miller and Moore agree that this rule provides a mechanism for class action treatment of unincorporated associations.[4] It is argued, however, that some courts have disagreed and held that the rule is merely a capacity-to-sue-or-be-sued provision to give entity treatment to an association.[5] The Advisory

[4] *See* 7A Wright & Miller, Federal Practice and Procedure: Civil § 1861 (1972); 3B Moore, Federal Practice, ¶23.2.02 (2d ed. 1977).

[5] *See Lee* v. *Navarro Savings Ass'n*, 416 F.Supp. 1186, 1190 (N.D. Texas 1976); *Suchem, Inc.* v. *Central Aguirre Sugar Co.*, 52 FRD 348, 351 (D. Puerto Rico 1971). *Lee* and *Suchem* are distinguishable, however, because neither court found that unincorporated associations did have entity status in Texas and Puerto Rico and therefore Rule 23.2 was not available. The Iowa rule, applicable by operation of Rule 17(b) FRCP, holds that unincorporated associations *do not* have entity status and cannot sue or be sued directly in the absence of waiver or estoppel. *See Boyer* v. *Iowa High School Athletic Ass'n*, 138 NW2d 914, 915 (Iowa 1965). The language of *Wilson & Co.* v. *United Packinghouse Wkrs. of America*, 181 F.Supp. 809, at 817 (N.D. Ia. 1960) and *Coughlon* v. *Iowa High School Athletic Ass'n*, 150 NW2d 660, at 662 (Iowa 1967) put in context here, is not otherwise. Finding that Rule 23.2 is available, the issue before the court here was never addressed by *Lee* nor was it properly before the court in *Suchem*.

Committee's Note to Rule 23.2 lends support to this latter interpretation.[6]

An examination of the rule itself and the writings of the commentators leads this court to conclude that Rule 23.2 FRCP is a class action provision and that plaintiff may assert its claim against the union as a class. The rule itself incorporates by express reference portions of Rule 23 FRCP.[7] The requirements of numerosity, commonality and typicality contained in Rule 23 may be subsumed implicitly into Rule 23.2.[8] In any event they are present here. This is in fact a bona fide unincorporated association and there is no suggestion that Rule 23.2 was utilized to evade the constraints on the court's jurisdiction.[9] *See* 7A

[6] The Advisory Committee's Note states:

"Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action the real or main purpose of this characterization has been to give 'entity treatment' to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b)." 39 FRD 108 (1966).

[7] Defendants point out that the provisions for notice and pleading present in Rule 23 are absent from Rule 23.2. This absence may be explained by the fact that the problems of defining the class and giving notice to the class that plague Rule 23 class actions are minimized in the context of an unincorporated association where the class is fairly defined and notice easily obtained.

[8] *See Merkey* v. *Board of Regents of State of Florida*, 344 F. Supp. 1296, 1303 (N.D. Fla. 1972) *vacated on other grounds* 493, F. 2d 790 (5th Cir. 1973). *But see Management Television Systems, Inc.* v. *National Football League*, 52 FRD 162, 164 (E.D. Pa. 1971). 7A Wright & Miller, *supra;* 3B Moore, *supra.*

[9] As defendants point out in Reply Brief filed October 7, 1977, at 8:

"It is well-settled that . . . [diversity] jurisdiction is available . . . in a traditional class action under Rule 23 where only the citizenship of class representatives is considered in determining whether diversity exists. *See Montgomery Ward & Co.* v. *Longer*, 168 F. 2d 182 (8th Cir. 1948)."

Wright & Miller, Federal Practice and Procedure: Civil § 1861, at 461 (1972). Accordingly, this action is maintainable as a class action; the citizenship of the representative defendants and plaintiff are diverse; motion to dismiss for lack of subject matter jurisdiction denied. *See generally Patrician Towers Owners, Inc.* v. *Fairchild,* 513 F. 2d 216, 220 (4th Cir. 1975); *Management Television Systems, Inc.* v. *National Football League,* supra.

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendants Hawkins, Cochrane, Krieger and Stern next move to dismiss for failure to state a claim for which relief can be granted. All complain of a lack of specificity and factual allegations—in the case of defendants Cochrane and Hawkins, as to the allegations in the complaint of breach of fiduciary duty and conspiracy; in the case of defendant Krieger, as to the allegations in the complaint of inducing breach of contract; in the case of defendant Stern, as to all of the above.

The standard for a motion to dismiss is that such a motion cannot be granted unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Cruz* v. *Beto,* 405 U.S. 319, 322 (1972). In this light defendants' motions fail and are denied.

MOTION TO ENJOIN PROSECUTION OF SEPARATE ACTION IN LIEU OF COMPULSORY COUNTERCLAIM

Plaintiff sought, by this motion, to prevent defendants Hawkins and Cochrane from pursuing an abuse

of process action in the United States District Court for the Southern District of Iowa. However, since that action was dismissed by Judge Stuart on November 17, 1977, this motion is denied as moot.

MOTIONS FOR PROTECTIVE ORDER AND MOTIONS TO COMPEL

A number of motions for protective orders and corresponding motions to compel have been filed in this action. In some instances the granting of one motion requires the denial of another. In each of these instances that result will be indicated.

The first motions for protective orders were filed by defendants Cochrane and Hawkins on July 22, 1977. They were unaccompanied by an affidavit of good faith attempts at resolution by alternate means and the movants were notified that no further action would be taken until Rule 16E of the Local Rules was complied with. Cochrane and Hawkins filed essentially the same motion for protective order, with affidavit, on August 30, 1977. The substance of the motion sought protection for documents subject to discovery requests in the antitrust suit M.D.L. No. 248 until such time as the documents are discoverable there. The motion also sought to protect documents alleged to be protected by the attorney-client privilege and work-product immunity. Finally, incorporating by reference a response to a request for production of documents, the defendants refused to produce requested documents so long as their motions to dismiss remained outstanding. Plaintiff's response was to move to compel production of those documents contained in its first request.

The overriding rationale applied with respect to all discovery motions is that discovery provisions are to

be broadly and liberally construed. *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947); *accord Schlagenhauf* v. *Holder*, 379 U.S. 104, 114–15 (1964). Taking defendants' last claim first, it is clear that this matter has been resolved by the court's ruling today. As to the claim that the documents are protected by work-product immunity and attorney-client privilege the court concludes that a blanket invocation of these doctrines to bar discovery is inappropriate. In this case, where state law supplies the rule of decision, Rule 501 FREv, the burden of establishing attorney-client privilege is on the defendants. *Bailey* v. *Chicago, Burlington & Quincy Railroad Co.*, 179 NW2d 560, 564 (Iowa 1970). That burden cannot be met by resort to a privilege incantation. The assertion must be document-specific with a sufficient articulation of the underlying circumstances and general substance, and identification of the parties involved, to establish a prima facie showing of privilege. This standard applies to the assertion of work-product immunity as well. In this instance defendants have not borne this burden.

The claim that defendants are protected from discovery requests pending in MDL No. 248 until the documents are allowed to be discovered in that action cannot be accepted. The effect of an assent to this idea would subordinate this action and ancillary discovery matters to another case filed in another district court. Discovery here cannot be predicated on what that court will do. However, this does not mean that the court is insensitive to the potential for interference with the conduct of orderly discovery in MDL No. 248. All parties have indicated that a voluminous amount of materials are subject to requests for discovery here. Bearing this in mind, together with the potential for interference with MDL No. 248, the

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court orders defendants Hawkins and Cochrane to comply with plaintiff's first request for production of documents [10] by producing the documents in the usual manner or by affording plaintiff a reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries at the place where the records are kept or at any other mutually agreed-upon place. *Cf.* Rule 33(c) FRCP. In the event discovery of the materials in this fashion results in undue interference with MDL No. 248 suitable protection may be obtained from this court on a *particularized* showing.

Plaintiff moved for a protective order on October 28, 1977, prohibiting defendants' inquiry into matters allegedly protected by attorney-client privilege, prohibiting inquiry into purported illegal acts by plaintiff, and restricting use of IBP business information to defense counsel for purposes of this case and to Cochrane and Hawkins for the purposes of MDL No. 248. The court grants the protective order limiting the usage of IBP's confidential business information and denies the motion regarding the claim of attorney-client privilege and the claim of the irrelevance of illegal acts.

Plaintiff falls prey to the same lack of specificity that defendants Hawkins and Cochrane do regarding a claim of attorney-client privilege. A mere recitation of the privilege litany is insufficient. The standards applicable to meeting the burden of establishing a privilege set out above aply here. Plaintiff cannot meet that burden by requesting protection from inquiry into "matters protected by IBP's attorney-client privilege".

[10] The court notes that defendants maintain that they have no documents falling within Specification No. 6 of plaintiff's first request for production of documents. On this representation defendants need not comply.

The court also rejects the claim that illegal acts by IBP are irrelevant to the case. The claim that the covenant between IBP and Bagley was intended to conceal illegal acts is central to defendants' case. A relevance objection is unavailing in this context.[11]

Defendants Cochrane and Hawkins filed a motion to compel answers to questions propounded during an oral deposition of William L. Heubaum, corporate counsel for IBP. The court has examined the questions and the context in which they were asked. It seems apparent that work-product immunity or the attorney-client privilege is applicable to the information sought.[12] Defendants, however, seek to overcome the immunity or privilege by invoking the improper purpose exception.[13] Defendants' burden in this respect is heavy—they must make a *prima facie* showing that the information sought was transmitted in furtherance of a crime or tort. *Pfizer, Inc.* v. *Lord,*

[11] Plaintiff would have the court determine in the guise of a protective order, in addition to its motion for summary judgment discussed *infra*, that the Bagley covenant does not offend public policy. The court is not willing to make that determination at this stage of the litigation.

[12] This is *not* true as to all information sought. For example, counsel for IBP claimed attorney-client privilege as to the *number* and *bulk* of file drawers regarding antitrust at Heubaum's office (Heubaum deposition, Volume I at 146–147) and as to *whether* certain documents, oftentimes the contents of which were disclosed, were sent to IBP's atorneys (Heubaum deposition, Volume I at 155, 210–213). This information is clearly not privileged.

[13] Defendants also invoke the general rule that privilege does not lie when business, as opposed to legal, counsel is sought. Though it may be true that a corporation cannot merely utilize general counsel as a conduit to protect all its documents and other information it is also true that defendants have not shown in even the slightest degree that this activity has occurred here. Merely noting that Heubaum serves Iowa Beef as Secretary and Vice-President as well as general counsel is insufficient.

456 F. 2d 545, 549 (8th Cir. 1972). *See In re Murphy,* 560 F. 2d 326, 338 (8th Cir. 1977). Defendants assert that "[t]he testimony in the present case . . . establishes conclusively the existence of antitrust violations by IBP". This assertion is exaggerated. In any event defendants must make a *prima facie* showing that the communication was pursuant to the crime or tort. *See In re Murphy, supra.* No such showing has been made. Except as noted herein, the motion to compel answers is denied.

Plaintiff moved to compel defendant Bagley to answer deposition questions which he has refused to answer on grounds of attorney-client privilege. An examination of the questions reveals that the information sought would be privileged. Plaintiff maintains, however, that the privilege was waived by Bagley's answer, paragraph 10, which allegedly injects a state-of-mind issue into the case. That paragraph states in part:

> It is affirmatively alleged that paragraph 3.2 of the Settlement Agreement was obtained by fraud and misrepresentation on the part of IBP.

Since this response does inject the question of reliance on IBP's statements or acts [14] Bagley cannot now prevent inquiry directed to that issue. This information is vital to plaintiff to meet Bagley's affirmative defense of fraud and misrepresentation. *See Haymes* v. *Smith,* 73 FRD 572, 577 (W.D.N.Y. 1976); *Hearn* v. *Rhay,* 68 FRD 574, 581 (E.D. Wash. 1975). Defendant Bagley is directed to answer questions relevant to the question of reliance; the attorney-client privilege is waived.

[14] See 37 Am. Jur. 2d, Fraud and Deceit § 223 *et seq; cf.* W. Prosser, Torts, 714 *et seq* (4th ed. 1971).

Motion For Summary Judgment

IBP moves for summary judgment against Bagley on the question of liability for breach of the settlement agreement with IBP and for violation of the fiduciary duty allegedly owed by IBP.

IBP has a particularly heavy burden of persuasion—the movant must show that there is no genuine issue of any material fact and that it is entitled to judgment as a matter of law. Rule 56(c) FRCP; *see Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464, 467 (1962). The court is required to view the facts in the light most favorable to the party opposing the motion and to give to that party the benefit of all reasonable inferences to be drawn from the facts. *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144, 158-59 1970). The court cannot say, at this point in the litigation, that there is no genuine issue of material fact. Furthermore, though IBP attempts to deemphasize the importance of the motion by carefully limiting it to Bagley, the preclusive effect of the ruling, if only from a reasoning standpoint, is apparent. The court considers it inappropriate at this time to resolve this issue and therefore a major portion of the lawsuit. Further discovery and a vigorous analysis of the relevant legal principles might make summary judgment feasible in the future.

It is therefore ORDERED:

1. Motions 1-6 inclusive and 8 above are denied.
2. Motion 7 is granted.
3. Motions 9 and 10 granted and denied in part.

February 10, 1978.

EDWARD J. MCMANUS,
Chief Judge,
United States District Court.

Subpena Duces Tecum

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Hughes A. Bagley

You are hereby commanded to produce the things identified on the attached schedule before the House Committee on Small Business and the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the House of Representatives of the United States, of which Hon. Neal Smith is chairman, by producing such things in Room 2359 of the Rayburn House Office Building, in the city of Washington, on November 7, 1978, at the hour of 10:00 A.M.

To United States Marshal, Northern District of Iowa to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 30th day of October, 1978.

[SEAL] /S/ NEAL SMITH, *Chairman.*

Attest:

/S/ EDMUND P. HENSHAW, Jr.,
Clerk.

SCHEDULE

All records, documents, writing, letters, memorandums and notes in your control or possession relating to the following:

1. The formula pricing for carcasses and boxed beef and any supporting data and/or studies pertaining to formula pricing.

2. The following items described in "Plaintiff's First Request for Documents", filed June 22, 1977, in *Iowa Beef Processors, Inc.* v. *Amalgamated Meat Cutters, et al,* Civil No. 77-4040, Northern District of Iowa:

> "2. Communications of any kind with anyone other than a defendant, involving or referring to IBP or its officers, directors, employees and representatives."
>
> "4. Documents obtained from any current or former officer, director, employee or representative of IBP."
>
> "5. Documents concerning IBP obtained from any source."

3. The Marketing of Meat and/or Meat Products in the United States.

4. Contracts or Agreements in regard to the transportation, merchandising, sale, and/or distribution of meat and/or meat products.

This Subpoena may be satisfied by furnishing the original (in lieu of the original, one copy) of each of the above-described items to a representative of this Committee in Sioux City, Iowa, on November 7, 1978, at 10:00 A.M.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, WESTERN DIVISION

Civil No. C77-4040

IOWA BEEF PROCESSORS, INC., PLAINTIFF

v.

PATRICK E. GORMAN, ET AL., DEFENDANTS

MOTION TO LIFT PROTECTIVE ORDER OR IN THE ALTERNATIVE FOR GUIDELINES

(Filed November 1, 1978)

COMES NOW, defendant Hughes A. Bagley, and in support of this Motion, respectfully states to the Court as follows:

1. On or about the 30th day of October, 1978, defendant Hughes A. Bagley was served with a subpoena duces tecum from the Small Business Subcommittee on SBA and SBIC Authority and General Small Business Problems of the House of Representatives of the United States, a copy of which subpoena is attached hereto marked Exhibit "A" and by reference made a part hereof.

2. The subpoena commands defendant Bagley to produce the things identified on the schedule attached to said subpoena, which attached schedule is attached hereto marked Exhibit "B" and by reference made a part hereof.

3. It appears that the subpoena duces tecum and the attached schedule commands defendant Bagley to produce to the House of Representatives Small Business

Subcommittee all of the documents which he produced pursuant to the plaintiff's First Request for Documents in the above-entitled cause of action, which documents have been placed under Protective Order by this Court.

4. Defendant Bagley does not want to be in contempt of Congress and does not want to be in contempt of this Court by turning over documents under this Court's Protective Order.

5. Defendant Bagley has no objection whatsoever to complying with the subpoena duces tecum attached hereto and certainly does not object to cooperating with the House of Representatives of the United States or any subcommittee thereof.

6. It is therefore the position of defendant Bagley that the Protective Order of the Court should be lifted to allow this defendant to comply with the attached subpoena, or in the alternative to provide guidelines under which he shall conduct himself regarding said subpoena.

WHEREFORE, defendant Hughes A. Bagley respectfully moves the Court to lift the Protective Order on the documents produced by defendant Bagley pursuant to plaintiff's First Request for Documents for the purpose only of defendant complying with the subpoena from the Subcommittee of the House of Representatives of the United States, or in the alternative to provide to defendant Babley sufficient guidelines as to actions he is to take concerning the subpoena above mentioned.

/s/ William J. Rawlings

WILLIAM J. RAWLINGS,
300 Toy National Bank Building,
Sioux City, Iowa 51101(712)277-2373,

Attorney for Defendant Hughes A. Bagley.

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UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF IOWA, WESTERN DIVISION

No. C 77-4040

(Filed November 13, 1978)

IOWA BEEF PROCESSORS, INC., PLAINTIFF
v.
PATRICK E. GORMAN, ET AL., DEFENDANTS

IBP'S BRIEF IN OPPOSITION TO DEFENDANT BAGLEY'S MOTION TO LIFT PROTECTIVE ORDER

1. Defendant Bagley has asked the Court to lift the protective order covering the documents produced by him in this case in order to permit him to comply with the subpoena served upon him by the Small Business Subcommittee of the U.S. House of Representatives. Alternatively, Bagley asks for guidelines from the Court as to the actions he should take in response to the subpoena.

2. Plaintiff Iowa Beef Processors, Inc. (IBP) opposes the motion to lift the protective order and asks instead that IBP's motion (unopposed by Bagley) to have Bagley's documents filed under seal with the Court be granted.

3. The strategem of the Subcommittee is plain; indeed, it is identical to the one followed unsuccessfully by the Subcommittee in the Beef Industry Antitrust Litigation before Judge Taylor: The Subcommittee serves a subpoena on a third party holding documents

covered by a judicial protective order. Since the third party himself has no interest in preserving the confidentiality of the documents and does not wish to be held in contempt by the Subcommittee, he attempts to have the Court lift the protective order. The Subcommittee stays out of court and thus avoids the need to give explanations or to make concessions or compromises; it also hopes that the Court will back down from a confrontation with Congress by removing the protective order. This ploy did not work with Judge Taylor, but the Subcommittee nevertheless is trying it again with this Court.

4. The question raised by the Subcommittee's actions is a substantial constitutional one involving the separation of powers between the Judicial and Legislative Branches: Does a judicial protective order bar a Congressional Subcommittee from using its subpoena power to obtain documents covered by the protective order? Judge Taylor ruled that a judicial protective order does have such effect and that the Subcommittee by subpoenaing the documents was violating due process rights by "interfering with the processes of a Federal Court in an individual case." *In re Beef Industry Antitrust Litigation,* 1978-2 Trade Cases ¶ 62,189 (N.D.Tex. 1978), at 75,315. The Subcommittee has appealed that decision; but rather than respect Judge Taylor's constitutional judgment until the Fifth Circuit reviews it, the Subcommittee has flouted it by pursuing the same conduct in a different jurisdiction.

5. Undoubtedly the Subcommittee wishes to obtain a decision from this Court which would aid it in the Fifth Circuit, but it does not even have the courtesy of formally appearing before the Court to state its position.

6. The behavior of the Subcommittee cannot be tolerated, but it would be condoned if Bagley's motion to lift the protective order were granted.

Therefore, IBP asks that defendant Bagley's motion to lift the protective order be denied. Instead IBP's motion to have Bagley's documents filed under seal with the Court, which Bagley does not oppose, should be granted. This would extricate Bagley from that tight space between a rock and hard place in which he now finds himself and would obviate the need for the Court to issue guidelines to Bagley concerning his response to the Subcommittee's subpoena.

Respectfully submitted,
/s/ James T. Malysiak

EDWARD W. ROTHE,
JAMES T. MALYSIAK,

Attorneys for Plaintiff,
Iowa Beef Processors, Inc.

Dated: November 8, 1978

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, WESTERN DIVISION

IOWA BEEF PROCESSORS, INC., PLAINTIFF
v.
PATRICK E. GORMAN, HARRY R. POOLE, and SAM TALARICO, AS REPRESENTATIVES OF THE MEMBERS OF AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO; IRVING STERN; ALBERT J. KRIEGER; LEX HAWKINS; JOHN A. COCHRANE; HUGHES A. BAGLEY; AND HANS AARSEN, DEFENDANTS

No. C 77-4040

ORDER
(Filed November 24, 1978)

This matter is before the court on Iowa Beef Processors, Inc.'s unresisted motion to have certain documents filed under seal with the court, filed October 13, 1978 and defendant Hughes A. Bagley's resisted motion to lift protective order or in the alternative for guidelines, filed November 1, 1978.

The thrust of the motions involve an attempt by the Small Business Subcommittee on SBA and SBIC authority and General Small Business Problems of the House of Representatives (Committee) to secure access to certain documents produced by defendant Bagley pursuant to plaintiff's first request for documents and which are presently under a protective order issued by this court.

Specifically, on February 13, 1978 this court granted IBP's motion for protective order restricting the use of Bagley's discovery material to counsel in this case for the purposes of this case and the Beef Industry Antitrust Litigation now pending in Dallas, Texas. The basis on which the protective order was originally issued was that the documents contained confidential information concerning IBP's business practices, etc. which would be detrimental to IBP's business if given to competitors.

From a review of the record it is the view of the court that the protective order should be modified as to the documents requested. The court can ascertain no great interference with its ability to proceed in this suit if the committee is allowed access to the records and the right to copy them as long as the originals still remain accessible to the parties to prosecute this action. IBP is free to approach the committee as to the scope of the use of the documents.

It is therefore ORDERED:

This court's protective order is modified to allow defendant Hughes A. Bagley to comply with the committee subpoena served upon him in this action.

November 22, 1978.

EDWARD J. MCMANUS, *Chief Judge,*
United States District Court.

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

IOWA BEEF PROCESSORS, INC., PLAINTIFF-APPELLANT

v.

HUGHES A. BAGLEY, DEFENDANT-APPELLEE

No. 78–1855

Appeal from United States District Court for the Northern District of Iowa, Western Division

Chief Judge EDWARD J. MCMANUS, *Presiding.*

ORDER

This case having come before the undersigned upon application of Plaintiff-Appellant, Iowa Beef Processors, Inc. (IBP) for suitable orders preserving appellate jurisdiction of this Court and for a stay pending appeal of the Order of the United States District Court for the Northern District of Iowa modifying a protective order covering certain documents procured and sought to be procured from one Bagley by the Committee on Small Business of the United States House of Representatives; and the Appellant having appeared by its attorney, Edward W. Rothe, and Special Counsel John Fitzgibbons having specially appeared for the House Committee;

And it appearing that the questions raised by the pleadings may directly or indirectly call into question both the power of the Congress to conduct unimpeded lawful pursuit of its investigative functions and authority of the Court to protect its litigation processes;

And it appearing that the Honorable Neal Smith, Chairman of the Committee, in recognition of the nature of the problems involved, has agreed that no portion of the materials which have heretofore come into possession of the Committee as a result of service of its subpoena dated October 30, 1978, and directed to Hughes A. Bagley of Sioux City, Iowa, will be disclosed publicly or privately or otherwise used prior to December 16, 1978, in order that the parties may present and the Court may consider in an orderly way the question presented; now therefore,

IT IS ORDERED that the order signed by Chief Judge McManus of the United States District Court for the Northern District of Iowa on November 22, 1978, and filed on November 24, 1978, modifying the protective order granted to IBP on February 13, 1978, to permit Hughes Bagley to respond to a purported subpoena from the Small Business Committee of the United States House of Representatives is hereby stayed temporarily until, and including, December 16, 1978; and,

IT IS FURTHER ORDERED that pursuant to Chairman Smith's agreement hereinabove mentioned, the Committee Staff and others acting in concert with them shall take no action with respect to the materials, the subject of this order, other than to protect them from scrutiny and disclosure during the effective life of this order.

Dated this 4th day of December, 1978.

J. SMITH HENLEY,
United States Circuit Judge.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 78-1855

IOWA BEEF PROCESSORS, INC., APPELLANT

v.

HUGHES A. BAGLEY, APPELLEE

Appeal from United States District Court
for the Northern District of Iowa.

Submitted: December 12, 1978
Filed: December 14, 1978

Before BRIGHT, HENLEY and MCMILLIAN, Circuit Judges.

PER CURIAM.

This case comes before the court on motion of Iowa Beef Processors, Inc. (IBP) for a stay pending appeal and for other suitable orders in the nature of extraordinary writs which would preserve appellate jurisdiction. We deny the stay and decline to issue such orders.

This case is the most recent manifestation of a lengthy, and increasingly acrimonious, course of litigation involving IBP. IBP has been the subject of numerous private antitrust suits in recent years. Several of these lawsuits have been brought by members of a group calling themselves the Meat Price Investigators Association and have been pursued by two lawyers, Lex Hawkins and John Cochrane. The Judicial Panel on Multidistrict Litigation transferred a

number of these private antitrust cases to the United States District Court for the Northern District of Texas for consolidated pretrial proceedings. *See In Re Beef Industry Antitrust Litigation,* 432 F. Supp. 211 (Jud. Pan. Mult. Lit. 1977); *In Re Beef Industry Antitrust Litigation,* 419 F. Supp. 720 (Jud. Pan. Mult. Lit. 1976). As part of the discovery proceedings in these Texas cases, the district court entered a protective order prohibiting attorneys Cochrane and Hawkins, among others, from disclosing the contents of documents obtained through discovery on the defendants, including IBP. It appears that some of these documents are the same as the documents in question in this case.

The instant litigation was begun by IBP in the Northern District of Iowa on August 1, 1977. IBP sued a number of defendants including Hawkins, Cochrane, and one Hughes A Bagley, a former vice president of IBP. IBP's complaint alleged that Bagley had taken a number of documents with him when he left IBP's employ in 1975 and that these documents contained confidential business information which would damage IBP's business if they were disclosed. The complaint further alleged that Bagley had disclosed certain confidential information and records to Hawkins, Cochrane, and others in violation of various contractual obligations and common law fiduciary duties. The case was referred to the docket of Chief Judge McManus who on February 13, 1978 issued an order deciding a number of pretrial motions. The order granted IBP's motion for a protective order preventing disclosure of IBP's confidential business information and limiting its use to defense counsel and to Hawkins and Cochrane for the purposes of the consolidated Texas cases.

Over a period of time, it appears that the House Subcommittee on SBA and SBIC Authority and General Small Business Problems (the Subcommittee) of the House Committee on Small Business has become interested in alleged price-fixing or other antitrust violations in the meat industry. In that connection, the Subcommittee served Hawkins and Cochrane with congressional subpoenas duces tecum compelling them to produce a number of documents, including some which were subject to the protective order issued in connection with the consolidated Texas cases. Hawkins and Cochrane moved to dissolve the protective order. The motion was denied by United States District Judge William M. Taylor, who held that the Subcommittee's attempt to subpoena the documents covered by the protective order violated the due process clause. *In Re Beef Industry Antitrust Litigation,* 1978–2 Trade Cases ¶ 62, 189 (N.D. Tex. August 17, 1978). Judge Taylor's decision is currently on appeal to the Fifth Circuit.

Frustrated to this point in its efforts to obtain this material in the Texas proceedings, the Subcommittee changed tactics. In late October, 1978 it served a similar subpoena duces tecum on Bagley, requiring him to produce a number of documents covered by Judge McManus' protective order. Bagley moved to dissolve the protective order and IBP opposed the motion. By order filed November 24, 1978 Judge McManus granted Bagley's motion and lifted the protective order to the extent necessary to allow Bagley to comply with the subpoena.

John M. Fitzgibbons, Special Counsel to the Subcommittee, was apprised of Judge McManus' order in a telephone conversation the same day. On November 27 a Subcommittee investigator, Nick Wultich,

appeared at the offices of Bagley's counsel and took physical possession of seven boxes of documents.

IBP's counsel learned of the order on November 28, and subsequently learned that the Subcommittee had acquired the documents. On November 30 IBP filed a notice of appeal from the order lifting the protective order. On December 4 IBP filed this motion for a stay and other appropriate relief. By order dated December 4 Judge Henley stayed the district court order pending a hearing before a panel of the court and recited an agreement whereby the Subcommittee and its staff would take no action with respect to the documents until, and including, December 16. The matter came on for a hearing before this panel on December 12.

Having carefully considered the papers and oral arguments submitted by IBP and the Subcommittee, whose Special Counsel appeared specially, we are of the opinion that a stay of the district court order is both inappropriate and unnecessary at this time.

We begin by noting the very limited scope of Judge McManus' order. The protective order of February 13 remains in effect as to all other parties to the litigation and as to any disclosure by Bagley other than as necessary to comply with the subpoena.

In regard to the disclosure to the Subcommittee, it has represented in its papers filed in this court and during oral argument that it has no intention of making public any of these documents, if ever, until after the House of Representatives begins its next session in January, 1979. In good faith, we must accept these representations made by members of a coordinate branch of government at face value. We are further assured that the Subcommittee and its Special Counsel will take all appropriate precautions to insure that these documents are disclosed only to

the extent necessary to allow the Subcommittee staff to begin the job of collating and classifying the information contained therein. In present circumstances any disclosure beyond the immediate needs of the Subcommittee and its staff would appear to be both unnecessary and a matter of grave import for all concerned.

Given the Subcommittee's representations to us and the limited nature of Judge McManus' order, we are of the opinion that granting a stay and compelling the return of the documents at this time is both unnecessary as a practical matter and inappropriate as a matter of comity. Such action would inevitably, albeit erroneously, be viewed as an expression of our lack of faith in the Subcommittee's representations to us. Such an expression would be particularly inappropriate in view of the Subcommittee's past cooperation with this court.

We are aware that this case presents serious jurisdictional and substantive questions and implicates fundamental concepts of legislative and judicial authority. Accordingly, we deem it appropriate that the case be heard on an expedited basis. The case will be scheduled for argument on the merits on January 9, 1979, and the Clerk is directed to work out an appropriate briefing schedule with the parties.

The motion for a stay pending appeal and for other appropriate relief is denied.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 78-1855

IOWA BEEF PROCESSORS, INC., APPELLANT

v.

HUGHES A. BAGLEY, APPELLEE

Appeal from the United States District Court for the Northern District of Iowa

Supmitted: January 9, 1979

Filed: February 7, 1979

Before BRIGHT, HENLEY and MCMILLIAN, Circuit Judges.

HENLEY, Circuit Judge.

Iowa Beef Processors, Inc. (IBP) appeals from the district court order which partially lifted a protective order entered in the course of discovery proceedings in this diversity suit. Treating the notice of appeal as a petition for a writ of mandamus, we grant the writ, vacate the district court's order, and remand the case with directions to reinstate, in full, the protective order.

I

IBP, which is described in the briefs as the world's largest meat packing concern, has been the target of numerous private antitrust suits in recent years. Many of these lawsuits have been brought by members of an organization calling itself the Meat Price Investigators Association and have been pursued by two lawyers, Lex Hawkins and John Cochrane. A number

of these cases have been transferred to the United States District Court for the Northern District of Texas for consolidated pretrial proceedings. *See in re Beef Industry Antitrust Litigation,* 432 F. Supp. 211 (Jud. Pan. Mult. Lit. 1977); *In re Beef Industry Antitrust Litigation,* 419 F. Supp. 720 (Jud. Pan. Mult. Lit. 1976). This antitrust litigation has, in turn, generated a massive amount of collateral litigation.

The instant case was begun by IBP in the Northern District of Iowa on August 1, 1977. IBP sued a number of defendants including Hawkins, Cochrane, and one Hughes A. Bagley, a former vice president of IBP. In its complaint, IBP alleged that Bagley had taken a number of documents with him when he left IBPs employ in 1975 and that these documents contained confidential business information which, if disclosed, would damage IBP's business. IBP further alleged that Bagley had disclosed certain confidential information and records to Hawkins, Cochrane, and others in violation of various contractual obligations and common law fiduciary duties. The case came before Chief Judge McManus, who on February 13, 1978 issued an order deciding a number of pretrial motions. In part, the order granted IBP's motion for a protective order preventing disclosure of IBP's confidential business information and limiting its use to defense counsel in the Iowa case and to Hawkins and Cochrane in connection with Texas antitrust cases.

Over a period of time, the House Subcommittee on SBA and SBIC Authority and General Small Business Problems (the Subcommittee) of the House Committee on Small Business has become interested in pricing practices in the meat industry. In that connection, the Subcommittee served Hawkins and one Glen L. Freie with congressional subpoenas duces

tecum compelling them to produce a number of documents, including some which were subject to a protective order issued in connection with the Texas antitrust cases.[1] Hawkins and Freie moved to dissolve the protective order. Their motion was denied by United States District Judge William M. Taylor, who held that the Subcommittee's attempt to subpoena the documents covered by the protective order violated the due process clause. *In re Beef Industry Antitrust Litigation,* 457 F. Supp. 210 (N.D. Tex. 1973). An appeal from that decision was recently dismissed by the Fifth Circuit, *Neal Smith, et al.* v. *The National Provisioner, et al.,* No. 78–3344 (5th Cir. February 2, 1979).

Frustrated in its efforts to obtain this material in the Texas proceedings, the Subcommittee changed tactics. In late October, 1978 it served a similar subpoena duces tecum on Bagley, requiring him to produce a number of documents covered by Judge McManus' February 13 protective order. Bagley moved to dissolve the protective order and IBP opposed the motion. By order filed November 24, 1978 the district court granted Bagley's motion and partially lifted the protective order to the extent necessary to allow Bagley to comply with the subpoena. It is from this order that IBP appeals.

In a telephone conversation John M. Fitzgibbons, Special Counsel to the Subcommittee, was apprised of the district court's order the day it was entered. On

[1] In addition to the two subpoenas served by the Subcommittee on SBA and SBIC Authority and General Small Business Problems, two subpoenas were served by the Subcommittee on Oversight and Investigation of the Interstate and Foreign Commerce Committee of the House of Representatives. The latter subcommittee is not involved in the instant case.

November 27 a Subcommittee investigator, Nick Wultich, appeared at the office of Bagley's counsel and took physical possession of seven boxes of documents.

IBP's counsel learned of the order on November 28 and subsequently learned that the Subcommittee had acquired the documents. On November 30 IBP filed a notice of appeal from the order lifting the protective order. On December 4 IBP filed a motion for a stay and other appropriate relief in this court. By order dated December 4 Judge Henley stayed the district court order pending a hearing before a panel of the court and recited an agreement whereby the Subcommittee and its staff would take no action with respect to the documents until, and including, December 16. The matter came on for a hearing before this panel on December 12, and on December 14 we issued an order denying the motion for a stay, but ordering the appeal expedited. *Iowa Beef Processors, Inc. v. Hughes A. Bagley,* No. 78–1855 (8th Cir. Dec. 14, 1978).

Despite the strenuous efforts of counsel to persuade us otherwise, we find that the case in its current posture presents a relatively narrow question, *i.e.,* did the district court abuse its discretion in granting Bagley's motion to lift the protective order? Prior to addressing this question, however, we must first examine our jurisdiction.

II

The district court order partially lifting the protective order is clearly not a "final decision" as that term is used in 28 U.S.C. § 1291, because the order is not "one which ends the litigation . . . and leaves nothing for the court to do but execute the judgment." *Catlin v. United States,* 324 U.S. 229, 233 (1945).

Thus, unless the order falls within a statutory or judicially-created exception to the finality doctrine, appellate review at this time is premature.

The order is not appealable under the Interlocutory Appeals Act, 28 U.S.C. § 1292. The order is not one granting or denying an injunction under § 1292(a)(1) nor did IBP move for certification under § 1292(b).

IBP argues that the order partially lifting the protective order is a "collateral order" within the meaning of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Most courts, including this one, have held that orders compelling the production of documents or testimony are not appealable as collateral orders or otherwise. *See, e.g., Miller v. Reighter,* No. 78–1276 (8th Cir. Sept. 20, 1978); *Gialde v. Time, Inc.,* 480 F. 2d 1295 (8th Cir. 1973); *Childs v. Kaplan,* 467 F. 2d 628 (8th Cir. 1972); *Borden Co. v. Sylk,* 410 F. 2d 843 (3d Cir. 1969); *Paramount Film Distributing Corp v. Civil Center Theatre, Inc.,* 333 F. 2d 358 (10th Cir. 1964). We view an order partially lifting a protective order as the functional equivalent of an order compelling production of documents or testimony and find the reasoning of the above-listed cases to be persuasive in this case. As the court observed in *Borden Co. v. Sylk, supra,* 410 F. 2d at 845–46:

> We have detected what appears to be an irresistible impulse on the part of appellants to invoke the 'collateral order' doctrine whenever the question of appealability arises. Were we to accept even a small percentage of these sometime exotic invocations, this court would undoubtedly find itself reviewing more 'collateral' than 'final' orders.
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> Every interlocutory order involves, to some degree, a potential loss. That risk, however, must be balanced against the need for efficient federal judicial administration as evidenced by the Congressional prohibition of piecemeal appellate litigation. To accept the appellant's view is to invite the inundation of appellate dockets with what have heretofore been regarded as nonappealable matters.

Accordingly, we hold that we have no appellate jurisdiction. This does not, however, end our consideration of possible bases of jurisdiction.

As an alternative to appellate jurisdiction, IBP contends that this is an appropriate case for us to invoke our discretionary writ-issuing authority under the All Writs Act, 28 U.S.C. § 1651(b),[2] and issue a writ of mandamus compelling reinstatement of the protective order and/or return of the documents.[3]

We begin by noting that the power conferred by the All Writs Act "is meant to be used only in the exceptional case where there is clear abuse of discretion or 'unsurpation of judicial power.' " *Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379, 383 (1953). In addition, invocation of power under the Act must be care-

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[2] The Act provides:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[3] Although we have occasionally treated a notice of appeal as a petition for a writ of mandamus, *see, e.g., Wilkins* v. *Erickson,* 484 F. 2d 969, 971 (8th Cir. 1973), we emphasize that we will not do so as a matter of course in every case where questions about appellate jurisdiction are raised. In cases such as the instant one, however, where the propriety of mandamus was raised from the outset, where the mandamus issue has been fully briefed, and where the interests of the district court have been actively presented, the notice of appeal may properly be treated as a petition for a writ of mandamus.

fully circumscribed, lest appellate courts find themselves reviewing "nonappealable orders on the mere ground that they may be erroneous." *Will v. United States,* 389 U.S. 90, 98 n.6 (1967). Bearing in mind these salutary and well-established restrictions, we nevertheless conclude that this case presents an appropriate occasion for us to invoke our power under the All Writs Act.

First, a number of courts, including this one, have found mandamus to be an appropriate vehicle to review orders compelling the production of documents or testimony claimed to be privileged or covered by other more general interests in secrecy. *See, e.g., Diversified Industries, Inc. v. Meredith,* 572 F. 2d 596 (8th Cir. 1978) (en banc) (attorney-client privilege); *Usery v. Ritter,* 547 F. 2d 528 (10th Cir. 1977) (disclosure of identity of informer in FLSA case); *Breed v. United States Dist. Ct.,* 542 F. 2d 1114 (9th Cir. 1976) (disclosure of personnel and inmate files of state youth authority); *Pfizer, Inc.* v. *Lord,* 456 F. 2d 545 (8th Cir. 1972) (attorney-client privilege); *United States* v. *United States Dist. Co.,* 444 F. 2d 651 (6th Cir. 1971), *aff'd,* 407 U.S. 297 (1972) (disclosure to conspiracy defendant of his monitored conversations); *Harper & Row Publishers Inc.* v. *Decker,* 423 F. 2d 487 (7th Cir. 1970), *aff'd by an equally divided court,* 400 U.S. 348 (1971) (attorney-client privilege); *Hartley Pen Co.* v. *United States Dist. Ct.,* 287 F. 2d 324 (9th Cir. 1961) (disclosure of secret formula acquired under license forbidding disclosure). In this case, IBP claims that the documents disclosed to the Subcommittee are covered by the attorney-client privilege and/or constitute trade

secrets in the nature of confidential business information.[4]

Second, the unique circumstances in which disclosure of these materials was allowed give rise to serious policy considerations which we deem sufficiently compelling to require immediate appellate attention. The parties have not cited, nor has our research disclosed, any case involving comparable facts. In addition to the uniqueness of the problem, it appears that the Subcommittee is engaged in an ongoing investigation. Because it is not inconceivable that other material generated in connection with this litigation may be sought by the Subcommittee, the questions presented here may well recur prior to any opportunity to review a final judgment.

Having found this case to be appropriate for review by way of mandamus, we turn to the merits of the district court's order.

III

On February 13, 1978 the district court entered a protective order restricting use of IBP business information to defense counsel in the instant case and to Cochrane and Hawkins for the purposes of the Texas antitrust cases. In so doing, the court implicitly conceded that any further disclosure would unduly

[4] The order of February 13 granted IBP's motion for a protective order only to the extent that the material in question constituted confidential business information. In the same order, the district court rejected IBP's claim of attorney-client privilege. Accordingly, we are concerned solely with the question of allegedly confidential business information.

harm IBP.[5] Yet, on November 24, without any showing that intervening circumstances had in any way obviated the potential prejudice to IBP, the court allowed disclosure of these documents to the Subcommittee without any constraints on the Subcommittee's use thereof.

Even more important than this abrupt and unexplained turnabout is the fact that the documents ordered disclosed to the Subcommittee were an important part of the subject matter of the underlying lawsuit. That is, IBP alleged that Bagley had breached both contractual and fiduciary obligations to IBP by disclosing the contents of these documents and sought an injunction preventing further disclosure and compelling the return to IBP of all such documents. In these circumstances, the district court should have maintained the status quo by carefully limiting disclosure of these documents pending determination of the merits of IBP's claim. The court's order allowing disclosure to the Subcommittee, without any limitation on its use of the documents, could well render moot in part IBP's claims for relief in the underlying lawsuit.[6]

On this record, then, we are compelled to conclude that the district court's order partially lifting the protective order was a clear abuse of discretion. Accordingly, we grant the petition for a writ of mandamus, vacate the district court's order of Novem-

[5] The party requesting a protective order must initially show that the information sought to be protected is within the scope of Rule 26(c) and that he might be harmed by its disclosure. 8 C. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2043 at 300–01 (1970).

[6] We, of course, express no opinion as to the merit, if any, of IBP's claims for relief in the underlying lawsuit.

ber 24, and remand the case with instructions to reinstate in full the protective order entered Febraury 13.[7]

We now turn to the Subcommittee and the relief sought against it by IBP. At the outset, it should be noted that the Subcommittee is not a party to the underlying litigation nor a party to this appeal.[8] Nevertheless, IBP requests that we order the Subcommittee to return the documents in question to the district court and to refrain from revealing the contents of those documents.

IBP's argument in this regard is premised on the allegation that the Subcommittee acquired the documents in an unlawful manner. IBP argues that Rule 62(a) of the Federal Rules of Civil Procedure oper-

[7] Out of what is, perhaps, an overabundance of caution, we emphasize that this opinion should not be construed as meaning that review by way of mandamus is available whenever a district court compels disclosure of material claimed to be protected by privilege or other interest in confidentiality. The rationale for invoked mandamus in such situations is twofold: (1) disclosure of the allegedly privileged or confidential information renders impossible any meaningful appellate review of the claim of privilege or confidentiality; and (2) the disclosure involves questions of substantial importance to the administration of justice. *Cf. Harper & Row Publishers, Inc.* v. *Decker*, *supra*, 423 F. 2d at 492. Where the case involves the attorney-client privilege, the importance of the privilege itself may serve to satisfy the second requirement. *Id.* In other cases where the claim of confidentiality is not so intrinsically a part of the administration of justice, some further showing is required. In the instant case, this showing has been made by the unique facts of this case (essentially making the case one of first impression), the possibility that similar disclosure will be sought prior to final judgment, and the fact that the allegedly confidential documents are themselves the subject of the underlying lawsuit.

[8] Special Counsel to the Subcommittee, John M. Fitzgibbons, appeared specially to brief and argue the case before this court.

ated automatically to stay the order partially lifting the protective order for a period of ten days and that the Subcommittee's "seizure" of the documents three days after the November 24 order violated the protective order.

Rule 62(a) provides, in pertinent part:

> Except as stated herein, no execution shall issue *upon a judgment* nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. (Emphasis added.)

The term "judgment" is defined in Rule 54(a), which reads in pertinent part:

> Judgment as used in these rules includes a decree and any order from which an appeal lies.

As we have noted, no appeal lies from the district court's order of November 24 and, accordingly, the automatic ten-day stay provision of Rule 62(a) does not apply in this case. The Subcommittee's action in taking possession of the documents thus was not in violation of the protective order.

Because the Subcommittee has neither been made a party to this litigation nor acted in such a manner as to violate an existing court order, we find no basis on the record now before us to compel the Subcommittee to return the papers is acquired as a result of its subpoena.

IV

We are aware that this opinion is probably not the final word in this controversy. As we have noted, however, the scope of our inquiry at this stage is severely limited. Any further action in this matter should be

pursued in a district court of competent jurisdiction[9] or before the Subcommittee itself.

We are also cognizant of the fact that this dispute has, at least in part, passed into the political arena. Indeed, from the very beginning, it was apparent that nonjurisprudential considerations have played an important part in the parties' litigation strategy. We dare to suggest that those concerned would have been well-advised to have worked out an arrangement among themselves which would take into account the competing interests, rather than attempting to foist upon this court the responsibility for resolving questions which are either beyond the scope of appellate judicial authority or outside the meager record of this case.

V

The petition for a writ of mandamus is granted, the district court order of November 24, 1978 is vacated, and the case is remanded to the district court with instructions to reinstate in full the protective order entered on February 13, 1978.

A true copy.

Attest:
Clerk, U.S. Court of Appeals, Eighth Circuit.

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[9] At least one court has held that jurisdiction and venue in actions against congressional committees and their members are normally proper in the United States District Court for the District of Columbia. *See Liberation News Service* v. *Eastland*, 426 F. 2d 1379 (2d Cir. 1970).

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 78–1855

IOWA BEEF PROCESSORS, INC., APPELLANT

v.

HUGHES A. BAGLEY, APPELLEE

Petition for Rehearing and Reconsideration

(Filed March 8, 1979)

COMES NOW Edward J. McManus, Chief Judge, Northern District of Iowa (Petitioner) and petitions the court for a rehearing and reconsideration of its decision and order herein filed February 7, 1979 treating Iowa Beef Processors, Inc.'s (IBP's) notice of appeal as a petition for writ of mandamus, granting the writ, vacating Petitioner's order of November 24, 1978 partially lifting a previous protective order of February 13, 1978 and reinstating the latter in full.

PROPOSITIONS RELIED ON

1. Under the facts of this case the partial lifting of the protective order was not a clear abuse of discretion.

2. Mandamus does not lie for the ordering of a useless and futile act.

FACTS

On June 6, 1977 IBP commenced this action in the Northern District of Iowa against Hughes A. Bagley

(Bagley) and six (6) other defendants seeking damages for their roles in an alleged malicious inducement to breach and breach of an employment settlement agreement between IBP and Bagley, its former vice president. Bagley left IBP's employ in July of 1975. IBP also sought a permanent injunction requiring the seven (7) defendants

> ". . . to cease disclosing to other persons confidential IBP information and documents in their possession or in the possession of any of their employees or agents, to return to IBP all such confidential IBP documents in their possession or in the possession of their employees and agents, and to provide a full account of all such confidential IBP documents which were but are no longer in their possession; . . . ."[1]

On October 28, 1977, among nine (9) other motions filed by the parties, IBP first moved for the protective order involved here.[2] This was almost two years after Bagley left IBP with the disputed documents and over four months after the suit was begun. Bagley did not resist the requested protective order and only token resistances were filed by defendants Cochrane

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[1] At no time did IBP seek either a TRO or a preliminary injunction.

[2] IBP's motion under Rule 26(c) FRCP sought inter alia

"3. An order preserving the confidentiality of IBP business information contained in the depositions of Bagley and Aarsen and in the documents produced by Bagley, Aarsen and Krieger, by restricting their use to defense counsel for the purposes of this action and to Hawkins' and Cochrane's use for the purposes of their antitrust case, MDL 248, subject to the protective order in that case."

and was supported only by the conclusory affidavit of Perry V. Haines, an IBP vice president that ". . . such confidential business information, if in the hands of competitor of IBP or the public generally, would be detrimental to the business of IBP."

and Hawkins regarding its scope. On February 13, 1978 Petitioner granted the protective order limiting the usage of IBP's business information to the extent requested in the motion which included the seven (7) boxes of documents Bagley had taken with him when he left IBP's employment in 1975.

On October 30, 1978 Bagley was served with a subpoena duces tecum from the Small Business Subcommittee on SBA and SBIC Authority of the United States House of Representatives (Subcommittee) requiring Bagley to produce for the Subcommittee the seven (7) boxes of documents in his possession covered by the protective order. On November 1, 1978 Bagley moved to lift the protective order as to the seven (7) boxes to allow compliance with the subpoena, which IBP resisted. By order of November 22, 1978 Petitioner granted Bagley's motion lifting the protective order only as to the seven (7) boxes to permit compliance with the subpoena.

On November 28, 1978 IBP first learned of the order and that a Subcommittee investigator had taken possession of seven (7) boxes of the Bagley documents on November 27. On November 30 IBP appealed the lift order to the Eighth Circuit which on February 7, 1979, with no notice to Petitioner,[3] treated the appeal as a petition for writ of mandamus under 28 USC § 1651(a), granted the writ, vacated the order of November 24, 1978 and ordered reinstatement of the protective order of February 13, 1978 in full. Apparently on the ground that it had no jurisdiction it denied IBP's prayer that the Subcommittee be ordered to return the documents to the district court and refrain from revealing their contents.

[3] As required by FRApp P. 21(b).

ARGUMENT

1. Under the facts of this case, the partial lifting of the protective order was not a clear abuse of discretion.

As noted by this court the All Writs Act is meant to be used only in the exceptional case where there is *clear abuse of discretion. Bankers Life & Cas. Co.* v *Holland,* 346 U.S. 379, 383 (1953). Mandamus against judges is a drastic remedy having the unfortunate consequence of making the judge a litigant. *Bankers Life, supra,* at 384. Courts faced with petitions for peremptory writs must be careful lest they suffer themselves to be misled by labels such as "abuse of discretion" and "want of power" into interlocutory review of non-appealable orders on the mere ground that they may be erroneous. *Will* v. *United States,* 389 U.S. 90, 98 n. 6 (1967); 9 Moore's Federal Practice, ¶ 110.28 at 308 (2d ed. 1975).

Though no Eighth Circuit case has been found defining "clear abuse of discretion", the words have often been defined elsewhere.

"Clear" means plain, obvious, free from doubt, beyond reasonable doubt. 7 Words & Phrases, "Clear", 88 (Cum.Supp. 1978); *Richard* v. *Western Fire,* 161 F.Supp. 115 (D.C. Minn.). "Abuse of discretion", for purposes of appellate review, means a result so palpably and grossly violative of fact and logic that it evidences not exercise of will, but perversity of will; not exercise of judgment, but defiance of law; not exercise of reason, but passion or bias and implies an unreasonable, arbitrary and unconscionable attitude by the trial court. 1 Words & Phrases "Abuse of discretion", 26–28 (Cum. Supp. 1978); *Wendel* v. *Swanberg,* 185 NW2d 348, 351 (Mich.).

With these facts and principles in mind, petitioner's modification of the protective order could not constitute a *clear abuse of discretion.*

First of all, Bagley had possession of the subpoenaed documents for almost two years prior to the filing of this lawsuit. His possession was not brought about by any discovery procedure. He took them when he left IBP's employ in the summer of 1975. Therefore, considerations of due process and interference with court processes found in *In Re Beef Industry Antitrust Litigation,* 457 F. Supp. 210 (N.D. Texas 1978) simply don't apply. There the court at p. 211 stated the issue before it:

> The sole question is whether Congress can subpoena documents in the hands of a litigant in a Federal Court proceeding from *that litigant who would not otherwise have them except for the discovery procedures of the Federal Courts* when there has been no showing of extraordinary circumstances. (Emphasis added).

During the two-year period Bagley had repeatedly disclosed the documents to untold numbers of other persons even including officials of the Packers & Stockyard Administration. (*See* IBP's brief in support of motion for protective order, pp. 8–17 and its prayer for permanent injunction, p. 7 of its complaint).

Furthermore, IBP chose not to seek a preliminary injunction which would have required some showing of its right to the documents whether in terms of likelihood of success on the merits or at least that a justiciable issue was presented. Rather it proceeded to seek a protective order based upon claimed confidential business records and chose to rely on the court's

exercise of its discretion to protect the records from further disclosure under Rule 26(c).

Since IBP's showing was limited to the nature of the records rather than the lawfulness of Bagley's possession, at the outset serious questions occurred to Petitioner as to the propriety of issuing an order prohibiting the use of records by a party whose possession of the records has never been shown to be unlawful. Rule 26(c)(7) does not authorize the court to limit use by a party of confidential information of another party if he has obtained it by some method other than discovery. 8 Wright & Miller Federal Practice & Procedure § 2043, at 308 n.33 (1970). Furthermore, in light of prior disclosures, IBP's showing as to harm from further disclosure was at best de minimus.

Here it also should be noted that no absolute privilege exists for trade secrets let alone business records. 8 Wright & Miller, *supra* at 300 n.17; *Natta* v. *Zletz,* 405 F. 2d 99 (7th Cir. 1969). However, generally courts have sought to avoid any prejudice from disclosure of confidential matter wherever possible. *See* 4 Moore's Federal Practice ¶26.60[4] (2d ed. 1976).

Although it appeared that confidentiality had probably been destroyed before suit was commenced, under all the circumstances including the token resistances by defendants, though it may have been in error as to the seven (7) boxes, the court nevertheless felt justified in including them in the original protective order.

On October 30, 1978 Bagley was served with the Subcommittee subpoena. The service of this subpoena was clearly a substantial intervening circumstance. Hence, unlike the Texas court, Petitioner uncon-

strained by serious due process considerations was free to review the protective order as to the seven (7) boxes in light of the competing interests now existing.

First had to be considered the strong interest of avoiding a head-on clash with a coordinate branch of government that certainly had a legitimate interest in investigating the matters sought. Annot., 19 ALR Fed. 970, 975 (1974). Second, Bagley's position of indifference to the protective order was abruptly changed to one of jeopardy, now finding himself caught on the horns of the dilemma of either citation by Petitioner or the Subcommittee. Finally, since the protective order was almost a year old, harm to IBP seemed even more remote and speculative.

Balancing all of these factors, including the doubtful propriety of the original order, Petitioner exercised his discretion to partially lift the protective order as to the seven (7) boxes. This limited modification of the order represented a serious consideration of all competing factors. So even if wrong, it can in no way be considered an "obvious perversity of will, defiance of law, exercise of passion or bias and a demonstration of an unreasonable, arbitrary and unconscionable attitude" by Petitioner, otherwise known as a clear abuse of discretion.

2. Mandamus does not lie for the ordering of a useless and futile act.

It is elementary that mandamus is an extraordinary remedy available only in cases in which the usual forms of procedure are powerless to afford relief. 52 Am. Jur. 2d, Mandamus § 5, at 334. It is

not a punitive remedy. *Will* v. *United States, supra*; 52 Am. Jur. 2d, *supra,* § 4 at 333. Being extraordinary and discretionary it should not issue to direct an ineffectual, useless or futile act. *Phillips* v. *McCauley,* 92 F. 2d 790 (9th Cir. 1937); 52 Am. Jur. 2d *supra,* § 305 at 631.

In its opinion this court apparently found that Petitioner had violated IBP's substantive rights by modifying the protective order. However, it expressly declined to grant IBP the relief it requested presumably for lack of jurisdiction over the Subcommittee and the documents.

Nevertheless it did mandamus Petitioner to reinstate the protective order in full. And for what conceivable purpose other than to slap Petitioner's hand? It accomplishes absolutely nothing for IBP whom it found was wronged. The documents are gone without a remedy. It does nothing for Bagley who had resolved his dilemma. It does nothing for the trial court who can neither retrieve the documents nor punish Bagley for contempt. It is a classic case of ordering the barn door closed after the horse escaped—a useless and futile act.

Furthermore, 28 USC § 1651(a) provides in part:

> "* * * all courts * * * may issue all writs necessary or appropriate in aid of their respective jurisdictions. * * *"

Since this court concluded that it had no jurisdiction over either the Subcommittee or the documents, the very language of the All Writs statute itself precludes the issuance of mandamus in a case where it has no jurisdiction to aid.

CONCLUSION

Under the guise of "clear abuse of discretion" it is suggested that the Eighth Circuit has again engaged in a cavalier and indiscriminate use of the mandamus power to order the doing of a useless and futile act and "to mask a questionable jurisdictional decision" as recently noted by three Justices of the Supreme Court in *ACF Industries, Inc.* v. *Equal Employment Opportunity Commission,* 47 USLW 3459 January 8, 1979.

Respectfully submitted,

/s/ Edward J. McManus

EDWARD J. MCMANUS
Chief Judge,
Petitioner.

MARCH 6, 1979.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

M.D.L. No. 248

In re: Beef Industry Antitrust Litigation

MEMORANDUM OPINION

(Filed August 17, 1978)

On March 16, 1978, two attorneys representing Plaintiffs in this litigation, John Cochrane and Lex Hawkins, and an officer of a Plaintiff, Glenn L. Freie, moved to the Court for leave to comply with Congressional subpoenas.

The four subpoenas were issued by two Congressional subcommittees, the Subcommittee on Oversight and Investigation of the Interstate and Foreign Commerce Committee and the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the House Committee on Small Business, both of the House of Representatives of the United States, 95th Congress.

Parts of the materials subpoenaed are covered by a protective order instituted in this proceeding.[1] On

[1] Parts are also covered by a protective order in the case of *Iowa Beef Processors, Inc.* v. *Gorman, et al.* No. C–77–440 (N.D. Iowa, W.Div.), which, of course, are not of kin in this proceeding.

March 22, 1978, a hearing was held in this Court in order to determine whether the motion of Messrs. Freie, Hawkins and Cochrane should be granted. At the conclusion of that hearing the Court orally announced its decision to deny the motion, which announcement is appended to this opinion. A formal order to that effect was entered on April 4, 1978.

May 30, 1978, the Subcommittees moved by their counsel and Counsel of the Clerk of the House for leave to file their motion to grant Plaintiff's request for leave to comply or in the alternative for clarification or modification of protective order. Leave to intervene and file the motion was granted the following day, June 1, 1978, and the motion was filed that day. A hearing on this motion was had on July 27, 1978.

At both hearings and in their briefs the Defendants in this proceeding whose documents were subpoenaed from Plaintiffs strongly opposed the motions on many grounds.

It should be made clear at the outset that the technical validity of the subpoena is not at issue. That question has never been squarely put before this Court by either of the two motions above mentioned or by any other party to this proceeding. The sole question is whether Congress can subpoena documents in the hands of a litigant in a Federal Court proceeding from that litigant who would not otherwise have them except for the discovery procedures of the Federal Courts when there has been no showing of extraordinary circumstances.

The Court has reached the conclusion that the motion of the Subcommittees must be denied.

The Federal Courts and the Congress have two different roles under our Constitution. Congress has the power and responsibility to enact legislation under

its enumerated powers and the "necessary and proper clause" of the Constitution.[2] The Federal Courts have the power to hear all cases and controversies arising under the Constitution and laws of the United States.[3] Congress has the power to circumscribe the jurisdiction of the various Federal Courts [4] and may pass laws which regulate the procedures in the Federal Courts [5] but has not the power to interfere in a particular case.

The Fifth Amendment to the Constitution states in part: "* * * nor be deprived of life, liberty, or property, without due process of law, * * *." Due process must entail the hearing of a case by a Federal Court without the interference of one of the other branches of the Government.[6]

In the instance before the Court now, the persons whom the Subcommittees have subpoenaed would not have possession of the subpoenaed documents but for the discovery rules of the Federal Courts. Congress by subpoenaing these documents is interfering with the processes of a Federal Court in an individual cases.[7] Had not a protective order been in force covering the documents, the Court would have entertained a motion for one.

Whether or not Messrs. Freie, Hawkins and Cochrane should have turned over any other documents to the Subcommittees given to them as a result

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[2] Article I, Section 8.

[3] Constitution. Article III. *Marbury* v. *Madison*, 5 U.S. 133, 2 L.Ed. 60 (1803).

[4] Ibid.

[5] *Wayman* v. *Southard*, 23 U.S. 1, 6 L.Ed. 1 (1825), in a particular case.

[6] *Kilbourn* v. *Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1880).

[7] The Subcommittees have not based their motion on any extraordinary need for these items to be subpoenaed from these individuals, so the question of extraordinary circumstances as a justification for the subpoena will be ignored by the Court.

of the discovery processes of this Court has not been presented to this Court and is probably a matter more of form than of substance since the other documents, not being covered by a protective order, have been spread upon the public record in the files of the Clerk of this Court.

For the reasons state the motion of the Subcommittees for clarification or modification of this Court's protective order in denied. Defendants' attorneys are requested to prepare and submit appropriate form of order.

/s/ W. M. TAYLOR, JR.,
United States District Judge.

Date: August 17, 1978.

APPENDIX

THE COURT: Well, gentleman, I can appreciate Mr. Hawkins and Mr. Cochrane's discomfort. Mr. Hawkins said something about somebody serving his time if found in contempt of Congress. I wonder if he wants to trade places with me and decide one of these, what appears to be a confrontation between Congress and the Judiciary, in connection with the Judiciary the responsibility to administer justice.

Now it appears to me, I may oversimplify the matter, it appears to me that Congressman Moss' committee is relying upon Eastland versus United States Servicemen's Fund and Judge Hart's opinion in the Gulf case, and apparently the committee thinks that that case gave Congress carte blanche to do anything that it wanted to do free from any review by the Courts.

Now throughout all of these cases that I have read and have been cited in these briefs, that is those cited in the briefs that I have been able in that time to read, it is consistently held that resolutions, subpoenas, even statutes enacted by Congress are subject to review and who but the Courts can exercise that power to review. Doesn't that go back to Marbury versus Madison or some such case as that, but in any event the Eastland case by the Supreme Court did not involve a court order, that is a court order, protective order as in this case. There the Court was saying simply that members of Congress are free, as I read the case, are free from interference by being hailed into Court in connection with their activities in their Congressional duties. It is inconceivable to me that Congress would or a committee of Congress would just run roughshod over an order of Court entered in connection with the disposition or trial or preparation of a case pending in Court. I just can't believe that Congress would undertake to do that or would do it. And it's also a little difficult for me to believe that the Justice Department would pursue a contempt matter, a contempt of Congress matter where lawyers in the position that Mr. Hawkins and Mr. Cochrane are, being under an order of this Court not to divulge this information. The information Congress seeks is available elsewhere and as I understand the record subpoenas have been issued for that purpose to acquire the information from some other source. I just cannot—Well, I don't think it would be proper for this Court under these circumstances where this Court has entered a protective order, just because Congress wants to get all of the information that some of the lawyers have, just step aside and say, "Well, go right ahead." I think the

orders of a Federal Court in its undertaking to dispose of cases, of lawsuits, have some significance and some importance. I'm going to deny the motion to modify or amend the order.

As I said, I understand the uncomfortable position that Mr. Hawkins and Mr. Cochrane may be in, but I think the order of this Court and this matter is important enough that it should be maintained and not set aside or modified.

Now, it was suggested that the committee should be before the Court. Of course, the Court is not going to subpoena the committee to come down and defend itself or anything of that kind. One of the counsel did call Mr. Purdy, my law clerk, about the matter.

Now, this order of mine refusing to amend or correct the protective order or relieve Mr. Hawkins of the effect of that order, of course, is without prejudice to the right of the committee and its counsel might well work out a confidential order or an agreement with the parties at interest here. So, I am going to deny the motion and, so to speak, let the chips fall where they may.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3344

IN RE: BEEF INDUSTRY ANTITRUST LITIGATION,

NEAL SMITH, ET AL., PLAINTIFFS-APPELLANTS

v.

THE NATIONAL PROVISIONER, INC., ET AL.,
DEFENDANTS-APPELLEES

Appeal From the United States District Court for the Northern District of Texas

(February 2, 1979)

Before THORNBERRY, FAY and RUBIN, Circuit Judges.

RUBIN, Circuit Judge:

The chairmen of two subcommittees of the House of Representatives and the Clerk of the House[1] seek to intervene in an antitrust suit pending in district

[1] Congressman Neal Smith is the Chairman of the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the Committee on Small Business. Congressman John E. Moss is Chairman of the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce. Hon. Edmund L. Henshaw, Jr. is the Clerk of the House. His interest in the case is not apparent from the briefs. *But see* Rule III (3), Rules of the House of Representatives for the 95th Congress, H. R. Doc. No. 94-663, 94th Cong., 2d Sess. (1977) (Clerk affix the seal of the House to all subpoenas.)

court among private litigants in order to gain access to documents subpoenaed by the subcommittees from a party to the litigation. The docuents were obtained by the subpoenaed party through discovery. Because the district court refused to modify its standing protective order or to allow the representatives of the party under subpoena to comply, the chairmen have appealed to this court. On a motion to dismiss, we must consider whether the action is properly before us.

There can be no doubt that the privilege of confidentiality, now embodied in Rule 26(c), Federal Rules of Civil Procedure, is a creation of Congress, just as are the rules relative to the procedure for obtaining subpoenas, *e.g.,* F.R.C.P. 45, and for intervention in pending lawsuits, F.R.C.P. 24. *See* 28 U.S.C. § 2071. The issue before us does not relate to the power of Congress but to whether Congress has acted. Cf. United States v. Gustin-Bacon Division, Certain-Teed Products Corp., 10 Cir. 1970, 426 F. 2d 539, 542, *cert. denied,* 400 U.S. 832, 91 S. Ct. 63, 27 L. Ed. 2d 63. It is respect for the duties and power of Congress, as set forth in Article I of the Constitution, that requires us to inquire whether Congress has authorized what these congressmen, as chairmen of their respective subcommittees, seek to do. Congressional committees are themselves the offspring of Congress; they have only those powers authorized by law; they do not have an unlimited roving commission merely by virtue of their creation and existence to ferret out evil or to uncover inequity. If Congress as a whole has created a privilege, then it is the duty of the court to protect it against violation even by a committee of that Congress. Such judicial action manifests respect for the law-making authority of the legislative branch of the government, not a lack of cooperation with its investigative efforts.

The appeal is related to a pending private antitrust suit, *In re* Beef Industry Antitrust Litigation (N.D. Tex., M.D.L. No. 248). In October 1976, the district court issued an extensive protective order based on Rule 26(c), F.R.C.P. The order allows documents and deposition testimony to be designated as confidential, and provides in part:

> Any information designated as confidential information shall not be made available to persons other than qualified persons or the party who produced the confidential information.

An exception is made if the court orders disclosure, or if the party designating the information as confidential consents to disclosure.

Two subcommittees of the House of Representatives, the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, and the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the Committee on Small Business, learned of the existence of the antitrust suit in the course of investigating the domestic beef industry. Each of the subcommittees issued subpoenas to attorneys representing one of the plaintiffs, the Meat Price Investigators Association, and to an officer of the Association, demanding documentary material obtained by MPIA from other parties during the course of discovery in the antitrust suit. The validity of the subpoenas was not challenged; however, because some of the material requested by the subcommittees was subject to the district court's protective order, MPIA moved for the court's permission to comply with the

congressional subpoenas. The court denied permission, but without prejudice to the right of the subcommittees to ask for relief on their own behalf. The chairmen of the two subcommittees did not seek to intervene in the suit; instead they sought leave to file a motion to grant MPIA's request, or for clarification or modification of the protective order. The court allowed the motion to be filed, but denied the relief requested. The two chairmen then appealed the trial court's denial of their motion. No party to the litigation joined in the appeal.

Before assessing the respective positions of the litigants, it is appropriate to consider the effect of the chairmen's failure to comply with the procedure for intervention established by Rule 24(c), F.R.C.P.[2] Some courts have held that it is reversible error to conduct any proceedings at the behest of parties who have failed to intervene formally pursuant to Rule 24(c). *E.g.,* Spangler v. Pasadena City Board of Education, 9 Cir. 1977, 552 F. 2d 1326. *See also* Moten v. Bricklayers, Masons and Plasterers International Union, D.C. Cir. 1976, 543 F. 2d 224. Other courts have been willing to ignore technical defects in the intervention process. *E.g.,* United States v. Louisiana, 5 Cir. 1976, 543 F. 2d 1125; Smartt v. Coca-Cola Bottling Corp., 6 Cir. 1964, 337 F. 2d 950, *cert. denied,* 1965 380 U.S. 934, 85 S. Ct. 941 13 L Ed. 2d 822. Occasionally, courts have been willing to overlook a total failure to comply with Rule 24(c). *E.g.,* SEC v. Lincoln Thrift Association, 9 Cir. 1978, 577 F. 2d 600; Roach v. Churchman, 8 Cir. 1972, 457 F. 2d 1101.

The Fifth Circuit has been lenient in hearing the

[2] This issue was not discussed by the parties; however, we consider it of sufficient importance to raise sua sponte. *See* SEC v. Lincoln Thrift Ass'n., 9 Cir. 1978, 577 F. 2d 600, 602.

appeals of non-parties. In Overby v. United States Fidelity and Guaranty Co., 5 Cir. 1955, 224 F. 2d 158, 162, we allowed the Acting Secretary of the Treasury, "whether or not he was formally recognized as a party to the suit," to appeal an order requiring the production of bank records in the bank's suit against its surety company because the Secretary had asserted that the records were privileged. A few years later, in Caswell v. Manhattan Fire & Marine Insurance Co., 5 Cir. 1968, 399 F. 2d 417, we held that a nonparty could appeal the denial of his motion to quash a subpoena. Finally, in United States v. United Fruit Co., 5 Cir. 1969, 410 F. 2d 553, *cert. denied,* 396 U.S. 820, 90 S. Ct. 59, 24 L. Ed. 2d 71, we allowed a nonparty to appeal the denial of its motion for permission to inspect and copy progress reports and programs sealed under a protective order. Although the panel considered whether it had jurisdiction over the case, it did not examine whether the nonparty had any right to file a motion with the district court, or to appeal without complying with Rule 24(c).

There is no question that the procedurally correct course for the chairman would have been first to obtain status in the suits as intervenors. *See* SEC v. Lincoln Thrift Association, *supra,* 577 F. 2d at 603. However, we note that the district court denied the plaintiffs' motion for leave to comply with the congressional subpoenas, "without prejudice to the right of the Committee and its counsel to appear before this court and ask for the relief that it seeks." This could be construed as an invitation to the chairmen to file their motion without first seeking formal intervention: indeed, the appellees use the words "permitted to intervene" when referring to the appellants' status in the motion to dismiss. *See* West v. Radio-Keith-

Orpheum Corp., 2 Cir. 1934, 70 F. 2d 621, 624, cited in SEC v. Lincoln Thrift Association, *supra,* 577 F. 2d at 602 (creditors had standing because they were "brought in in invitum"). *Compare* United States v. United Fruit Co., *supra,* 410 F. 2d at 554 ("The [protective] order provided that third parties could not, without an express order of the court inspect or copy any document submitted. . . ."); Roach v. Churchman, *supra,* 457 F. 2d at 1104 (affording relief to a participant without formally naming it as a party deemed "equivalent to authorizing" intervention). In view of our lenience in the past and the fact that the district court's acts might be considered equivalent to authorizing intervention, we will not dismiss for the failure to comply with Rule 24(c), but we will assume that the district court implicitly authorized the chairmen to intervene. However, we reiterate that a formal motion for intervention should have been filed pursuant to Rule 24(c). Future litigants should not attempt to use this opinion to circumvent the clear requirements of the rule. We now turn our attention to the issues raised by the litigants.

In response to the appeal filed by the chairmen, one of the defendants, The National Provisioner, Inc., filed a motion to dismiss because neither subcommittee had obtained authorization from the House of Representatives before it sought to file the motion in the district court; we note ourselves that neither has obtained authority to appeal. The premise of the motion to dismiss is that authorization is required by Rule XI, cl. 2(m)(2)(B) of the Rules of the House of Representatives for the 95th Congress, H.R. Doc. No. 94–663, 94th Cong., 2d Sess. (1977), before a congressman may appear in court on behalf of a committee or subcommittee; that rule provides:

> Compliance with any subpena [sic] issued by a committee or subcommittee . . . may be enforced only as authorized or directed by the House.

The position of the chairmen is that authorization under this rule is not required both because they seek modification of a court order rather than judicial enforcement of a congressional subpoena and also because they do not desire to retain outside counsel to represent their subcommittees in court. However, they point to no other rule and to no statute that confers general authority to prosecute or intervene in law suits or undertake other actions in the courts.

While the opinion of two congressmen on the applicability of a rule of the House is certainly entitled to serious consideration by this court, we note that legislative committees and congressmen have been held to observance of the rules of Congress and that those rules are judicially cognizable. Yellin v. United States, 1963, 374 U.S. 109, 114, 83 S. Ct. 1828, 1832 10 L. Ed. 2d 778, —. *See also* Christoffel v. United States, 1949, 338 U.S. 84, 69 S. Ct. 1447, 93 L. Ed. 1826. In interpreting the meaning and scope of the House rule it is appropriate to examine congressional practice under that rule. *See* Yellin v. United States, 374 U.S. at 116–17, 83 S. Ct. at 1833, 10 L. Ed. 2d at —.

One of the chairmen before us, Representative John E. Moss, has previously intervened on behalf of the Subcommittee on Oversight and Investigations in a then-pending case, Ashland Oil, Inc. v. FTC, D.D.C. 1976, 409 F. Supp. 297, *aff'd,* D.C. Cir. 548 F. 2d 977 (per curiam). That case arose when Ashland Oil sought to enjoin the Federal Trade Commission from transferring secret information obtained from

Ashland (apparently not in the course of litigation) to the Subcommittee on Oversight and Investigation of the Committee on Interstate and Foreign Commerce at the request of Subcommittee Chairman Moss. A week after Ashland Oil obtained a temporary restraining order, the subcommittee authorized a subpoena for the documents, *Id.* at 301. On the same day, Congressman Moss filed a resolution for authorization from the House to intervene with special counsel in the suit that Ashland Oil had filed seeking to enjoin the FTC from transferring the documents to the subcommittee.[3] H. R. Res. 899, 94th Cong., 1st Sess. (1975). *See* 121 Cong. Rec. 38213.

The resolution passed by the House authorized Congressman Moss to "intervene and appear" in the pending action in district court on behalf of the committee. The report accompanying the resolution, H.R. Rep. No. 94–756, explained why the resolution was necessary. It noted, "The Supreme Court has ruled that a committee (or subcommittee) must have specific authority from the appropriate House in order to undertake *any court action.* Reed v. County Commissioners, 277 U.S. 376 (1928)."[4] (Emphasis supplied.) H. R. Rep. No. 94–756 at 22. The resolution was approved with unanimous consent. 121 Cong. Rec. 41707 (1975). After obtaining authorization, Congressman Moss sought and was granted leave to intervene in the suit pursuant to F.R.C.P. 24(a). 409 F. Supp. at 301.

[3] Rule XI, cl. 2 (m)(2)(B) of the Rules of the House of Representatives for the 94th Congress, H. R. Doc. No. 93–416, 93d Cong., 2d Sess. (1975) is identical to the previously quoted rule of the 95th Congress.

[4] In Reed v. County Commissioners, 1928, 277 U.S. 376, 48 S.Ct. 531, 72 L.Ed. 924, the Supreme Court dismissed a suit brought to compel the production of documents because the members of the committee were not specifically authorized by the Senate to bring suit. Specific authorization has also been required in the context of prosecutions for contempt of Congress. *Cf.* Gojack v. United States, 1966, 384 U.S. 702, 716, 86 S.Ct. 1689, 1698, 16 L.Ed.2d 870, — ("the line of authority from the House to the Committee and then to the subcommittee must plainly and explicitly appear").

In *Ashland Oil,* Congressman Moss was not seeking to obtain judicial enforcement of a congressional subpoena; he intervened to obtain the dissolution of the temporary restraining order that prevented the FTC from sending requested documents to his committee, and to oppose any temporary or permanent injunction that Ashland Oil might have sought to prevent the transfer of the documents for a longer period. Moreover, although special counsel was authorized in H. R. Res. 899, that was not the sole purpose of the resolution; it is clear that the resolution was submitted and passed because the Congressman himself stated that he needed such authorization. *See, e.g.,* H. R. Rep. No. 94–756 at 20–21. Neither the resolution nor the accompanying report provide any basis to support the view that under the House rules authorization is required only when special counsel is to be retained.

Thus based on the practice in the House of Representatives, as revealed by Congressman Moss's actions in the *Ashland Oil* case, it is apparent that Rule XI, cl. 2(m)(2)(B) requires House authorization not only for direct enforcement of a subpoena but also in any instance when a House committee seeks to institute or to intervene in litigation and, of course, to appeal from a court decision, particularly when the purpose is, as here, to obtain the effectuation of a subpoena. Congressmen Smith and Moss failed to obtain a House resolution or any other similar authority before they sought to intervene in the beef industry case. If every

subcommittee of the Congress is to have inherent authority to intervene in pending suits, to file motions in litigation throughout the nation and to prosecute appeals from district court decisions, a general grant of authority by statute or resolution would appear appropriate. In the absence either of such a general authorization or specific authorization for the actions here taken, the motion to dismiss the appeal is granted.[5]

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[5] In view of our disposition of the case, we need not consider, sua sponte, the question of the mootness of the congressional subpoenas. Since the 95th Congress has adjourned, the subpoenas may no longer be in force, *See* Eastland v. United States Servicemen's Fund, 1975, 421 U.S. 491, 512, 95 S.Ct. 1813, 182, 44 L.Ed.2d 324. * * *. Neither need we consider the validity of the technical objection that, in filing the appeal, the chairmen appeared to act individually and not in their official capacities on behalf of their committees. For the purpose of this opinion, we have assumed, without deciding, that Congressmen Smith and Moss are acting on behalf of their respective committees.

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